

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
City Signal Communications, Inc.	)	
	)	CS Docket No. 00-253
Petitioner	)	
v.	)	
	)	
City of Cleveland Heights	)	
	)	
Defendant	)	

In the Matter of	)	
	)	
City Signal Communications, Inc.	)	
	)	CS Docket No. 00-254
Petitioner	)	
v.	)	
	)	
City of Wickliffe	)	
	)	
Defendant	)	

In the Matter of	)	
	)	
City Signal Communications, Inc.	)	
	)	CS Docket No. 00-255
Petitioner	)	
v.	)	
	)	
City of Pepper Pike	)	
	)	
Defendant	)	

**Comments of  
Metromedia Fiber Network Services, Inc.**

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## SUMMARY

Metromedia Fiber Network Services, Inc. (“MFNS”) submits its comments on the Petitions for Declaratory Ruling filed by City Signal Communications, Inc. (“City Signal”). City Signal asks the Federal Communications Commission (“Commission”) to preempt any pronouncement, rule, regulation, or ordinance by the Ohio cities of Pepper Pike, Cleveland Heights, and Wickliffe (collectively “Defendant Cities”) that prohibits, or may have the effect of prohibiting, the ability of City Signal from providing interstate or intrastate telecommunications service and order that permits be issued to City Signal to construct fiber optic aerial facilities in the defendant Cities. The Commission issued a Public Notice on December 22, 2000 seeking comments on City Signal’s petitions.

As a telecommunications provider,<sup>1</sup> carriers’ carrier, and facilities provider, MFNS has the critical need to have nondiscriminatory access to the public rights-of-way in order to build its high-bandwidth, fiber optic communications infrastructure and offer competitive telecommunications services to its customers. Like City Signal, MFNS has had difficulty obtaining access to public rights-of-way in a non-discriminatory manner, and at just and reasonable rates.

MFNS urges the Commission to grant City Signal’s petitions to the fullest extent permitted and make it clear to all state and local governments that they must follow the letter of the Telecommunications Act of 1996 codified at 47 U.S.C. § 151, *et seq.* (“Act”) and state laws, including responding in a timely manner to carrier requests for permits,

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<sup>1</sup> MFNS is a certified telecommunications service provider in 42 states and the District of Columbia.

meeting statutory deadlines, treating carriers in a fair and non-discriminatory manner, and charging only legally permitted fees.

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**Comments of  
Metromedia Fiber Network Services, Inc.**

## **I. INTRODUCTION**

MFNS is a leader in providing dedicated fiber optical infrastructure and high-bandwidth advanced services for communications intensive customers throughout the United States and in several European cities. MFNS is leading the country's transition from a legacy copper telecommunications infrastructure to a fiber infrastructure. To date, MFNS has installed over 1.2 million fiber miles of fiber optic cable.

MFNS or its affiliates currently provide high-bandwidth fiber optic communications facilities and services to carriers and end use customers in New York, Philadelphia, Washington, D.C., Chicago, Dallas, San Francisco, Seattle, Baltimore, Houston and Boston. MFNS is currently constructing networks in additional markets and intends to complete expansion into 50 U.S. markets within the next several years.

The Commission has given all telecommunications service providers a welcome opportunity by issuing the Public Notice and inviting comments on the difficulties they are having in obtaining lawful and reasonable access to public rights-of-way. The Commission must make it clear that states, counties and particularly local governments ("Municipalities") must stop all activities that clearly and continuously violate section 253 of the Act.

MFNS is sympathetic to City Signal's problems and applauds it for its courage in seeking Commission intervention. Too often, carriers are reluctant to take public action against Municipalities for fear of retribution, including further permitting delays. As will be demonstrated in these comments, the issues raised in City Signal's petitions are symptomatic of a very large problem that carriers face nationwide in deploying their

networks. In fact, it is with some trepidation that MFNS brings its Municipal problems to the attention of the Commission. However, the barriers to providing service presented by Municipalities are so pervasive and real that MFNS is taking this risk in the hope that the Commission will begin to take action of a general nature on this issue. Consequently, although City Signal's petitions are confined to the Defendant Cities, MFNS strongly urges the Commission to take this opportunity to clarify and strengthen carriers' rights to occupy the public right-of-way in all Municipalities.<sup>2</sup>

In the area of pole attachments, the Commission has recognized the utility's superior bargaining power over cable and competitive telecommunications companies seeking attachment to the utility's facilities.<sup>3</sup> The public rights-of-way controlled by municipalities constitute a bottleneck similar to pole attachments. Consequently, the Commission should make similar findings in the context of access to the public rights-of-way. The Act's promises of greater innovation and lower prices will not be realized until all bottlenecks, including right-of-way access, are eliminated.<sup>4</sup>

The types of difficulties that MFNS has experienced in obtaining access to public rights-of-way fall generally into the following four categories:<sup>5</sup>

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<sup>2</sup> In July 1999, the Commission issued a Notice of Inquiry on Access to Public Right-of-Way and Franchise Fees. See WT Docket No. 99-217, released July 7, 1999. MFNS urges the Commission to take the comments provided in that Notice of Inquiry and the comments received in these proceedings and initiate a rulemaking that will address the numerous and troublesome issues that providers face for access to the public right-of-way.

<sup>3</sup> *Texas Cable and Telecommunications Assoc., et. al. v. Entergy Services, Inc., et. al.*, PA 97-005, 14 FCC Rcd 9138, para. 12 (1999) quoting *Second Proceeding*.

<sup>4</sup> The Act was enacted "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." S. Conf. Rep. No. 104-230, 104<sup>th</sup> Cong., 2d Sess. at 1 (1996).

<sup>5</sup> The Commission should be aware that many issues span categories. MFNS has attempted to place issues in the category that seems to fit the issue best.



- ✓ **Rights-of-way access conditioned on extortionate demands** for money and in-kind compensation that clearly violate the Act and/or state law.
- ✓ **Formal and informal permitting moratoriums** lasting over a year, pending the city's study of the issue and possible adoption of new ordinances to manage the rights-of-way. In addition to preventing the provision of telecommunications services, these moratoriums are often discriminatory in that they commonly do not apply to other utilities, including the incumbent telephone company.
- ✓ **Excessive regulatory burdens**, whether formally imposed through an ordinance, or informally imposed in an ad hoc manner at the permit counter.
- ✓ **Routine permitting delays** of up to eight months, often including violation of statutory deadlines.

As a facilities provider and competitive carrier, MFNS is in a unique position to promote telecommunications competition by providing state-of-the-art facilities to telecommunications providers anxious to serve end-user customers but unable to build a complete network in a time responsive and cost effective manner. MFNS also provides technically advanced services to bandwidth-hungry customers.

Unfortunately, MFNS has been constantly delayed in constructing its network because Municipalities purposely delay or demand unreasonable compensation in exchange for access to the public right-of-way. In fact, but for the delays imposed by Municipalities,

MFNS' networks would be operational in several of the markets where it is currently constructing, including the metropolitan areas of Los Angeles and Kansas City.<sup>6</sup>

Finally, although these comments will provide the Commission with a significant number of examples of abuse from Municipalities other than the Defendant Cities, in some instances MFNS has chosen not to name the specific Municipality for fear of retribution in future dealings with them.<sup>7</sup> However, in these instances, the examples of abuse seemed so egregious that MFNS believed it was worth bringing to the Commission's attention, even without reference to the responsible municipality. Additionally, MFNS is willing to provide the Commission with additional information and supporting documentation, including declarations, on any of the situations described herein.

## **II. CALIFORNIA MUNICIPALITIES DESERVE SPECIAL MENTION**

MFNS has encountered a troubling and growing number of problems in California Municipalities that it cannot specifically discuss in these comments because of ongoing settlement discussions with a number of the offending jurisdictions. However, MFNS believes that the general problem is worth special mention here. Increasingly, California municipalities are erecting barriers to entry and intentionally discriminating against competitive local carriers under the guise of rights-of-way management programs and ordinances. Given California's status as the largest telecommunications market in the country, MFNS hopes that the Commission will take special note of what is likely to be a serious continuing threat to telecommunications competition in that state. MFNS

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<sup>6</sup> While MFNS is operational in the Kansas City central business district and has point to point connections to some Kansas City towns, these comments will show that MFNS has been unable to complete its ring and provide redundant service throughout the Kansas City metropolitan area due to unreasonable demands imposed by a number of Kansas City municipalities.

welcomes Commission efforts to educate Municipalities and provide speedy mechanisms to resolve issues of the type raised in California.

The primary reasons for carrier difficulties in California stem from the impacts wrought by the infamous "Proposition 13,"<sup>8</sup> which limits a Municipality's ability to increase existing taxes or implement new ones. Proposition 13 has forced cash-starved cities to look for other sources of revenue. Creative Municipalities with little concern for their obligation to uphold state and federal law have turned to telecommunications carriers as a source of new revenue.

State law clearly provides all telephone companies a state-wide franchise to use the public rights-of-way and California Supreme Court cases construing this law have consistently ruled that Municipalities are forbidden from requiring separate franchises from telephone companies seeking to use their public rights-of-way. (*See* California Public Utilities Code Section 7901); Pacific Tel. & Tel. Co. v. City & County of San Francisco, 51 Cal.2d 766, 771 (1959) (telephone corporations receive a franchise from the state, "to use the public highways ... without the necessity for any grant by a subordinate legislative body"); and Pacific Tel. & Tel. Co. v. City of Los Angeles, 44 Cal.2d 272, 279-282 (1955) (telephone corporations may use their telephone lines to transmit telegraph messages, teletypewriter messages, telephotographs, program services such as radio and television broadcasts, and any other communication service by means of the transmission of electrical impulses).

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<sup>7</sup> MFNS has sought to serve the City Attorney or other responsible public official in each of the jurisdictions specifically named in these comments.

<sup>8</sup> California Const. Art. XIII A, Sec. 4.

Notwithstanding these restrictions, many Municipalities routinely withhold permits from MFNS and other competitive telephone companies until they agree to pay unlawful compensation for use of the public rights-of-way, or litigate the issue. Municipalities view the advent of telecommunications competition as their chance to take a fifth or sixth swing at the fairly sturdy legal piñata that California Public Utilities Code Section 7901 represents.

Thus far, the majority of competitive carriers faced with this Hobson's choice elect to pay for access to the rights-of-way because of concerns regarding speed to market. While carriers like MFNS are certain that they could ultimately prevail in court, no carrier has any certainty that the courts will provide a speedy remedy. A delay of two or three years to enforce MFNS' rights is simply not an option.

Even worse than the immediate demands for money encountered in some California Municipalities, is the extortion combined with *unending delays* faced in others. In the worst cases the Municipalities impose moratoria to "study" the issue five years after the Act was signed, delaying construction for nine months to a year, and *then* demand even *higher payments or in-kind compensation* than those being demanded by their quicker moving counterparts.

It is clear from discussions with California Municipalities that this problem is only going to get worse – and that competition and California consumers will suffer. Even now, where network engineering will permit, carriers routinely route around troublesome cities, such as Los Alamitos and Culver City in southern California. MFNS has contractors standing by to complete its northern California loop as soon as MFNS is able to overcome the delays and demands presented by jurisdictions like Berkeley. Further delays will force

MFNS to consider expensive re-routing options bypassing Berkley customers that deserve the benefits of the Act like all citizens. Clearly, these are exactly the kinds of delays intended to be prohibited under Section 253 of the Act, and which occur in the absence of speedy and conclusive enforcement options.

### **III. RIGHTS-OF-WAY ACCESS IS OFTEN CONDITIONED ON EXTORTIONATE DEMANDS**

Access to public rights-of-way is almost routinely conditioned on MFNS' provision of monetary or in-kind compensation that clearly violates the Act and/or state law. In most cases, the Municipality is clearly prohibited under state law from requiring compensation for use of the rights-of-way, but the Municipality makes the argument that the law is no longer valid in light of the Act, changing technology, or an absurd interpretation of the law.<sup>9</sup> Consequently, MFNS is left to either route around the Municipality, litigate the issue (which will take several years, further delay MFNS' access to rights-of-way in the interim, and impact customer choice), or pay the requested, but illegal, compensation for access to the rights-of-way. In almost all of these instances, the request is discriminatory because the incumbent local exchange carrier is not required to make the same payments. In many of these cases, MFNS enters into the agreements and pays the unlawful, demanded compensation because the delay involved in litigation is simply unacceptable to remain competitive. To add insult to injury, MFNS is often required by the Municipality to waive its rights to later challenge the validity of the agreement.<sup>10</sup> These Municipalities understand and abuse the need of telecommunications providers to obtain immediate access

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<sup>9</sup> In some instances the Municipality simply refuses to provide any legal rationale for its position.

<sup>10</sup> Compare with "any attempt to require an attachor to waive its rights and remedies under § 224 would be a per se violation of § 224." *Cavalier Telephone LLC v. Virginia Electric and Power Co.*, Docket No. DA 00-1250, para.5. (2000). The Commission should make a similar holding in the area of § 253.

to their rights-of-way and to which the carriers are legally entitled. The demanded waiver of rights is further evidence of this duplicity. These Municipalities simply have no incentive to comply with the law when they know it will take years for a carrier to obtain “justice” from the legal system.

Some Municipalities require MFNS to pay unlawful fees or provide in-kind compensation claiming that MFNS’ services do not qualify under the state’s definition of telecommunications services and thus entitled to access to the public right-of-way without a franchise or fees. This is often the case with MFNS’ dark fiber offerings. Since dark fiber will eventually be lit to provide a telecommunications service, this distinction is meaningless and creates a clear barrier to entry prohibited by section 253 of the Act. MFNS urges the Commission to make clear that the installation of dark fiber is entitled to access to the public right-of-way pursuant to section 253(c). This conclusion is no different than the holding made by the Commission in *In re Implementation of Section 703(e) of the Telecommunications Act of 1996*<sup>11</sup> and upheld by the Eleventh Circuit in *Gulf Power* 2<sup>12</sup> permitting the placement of dark fiber on Pole Attachments pursuant to section 224 of the Act. The language of sections 224(f) and 253(c) are very similar and, thus, supports making such a conclusion regarding access of the public right-of-way and installation of dark fiber.

The following are examples of such extortionate practices:

- The cities of **Walnut Creek and Richmond, California** insisted that the state’s law giving all telephone companies a statewide franchise without direct compensation did

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<sup>11</sup> 13 FCC Rcd 6777 (1998)

<sup>12</sup> *Gulf Power Co. et. al. v. Fed. Communications Comm., et. al.*, 208 F.3d 1263 (2000).

not apply to MFNS, despite the fact that MFNS is a certificated provider in California.

These cities made the implausible assertion that only voice telephony is telephone service and that any other service, such as data transport, is not a telephone service.

They presented this position to MFNS, despite a California Supreme Court case that is directly on point affirming that a telephone corporation may use its lines for telegraph messages, teletypewriter messages, telephotographs, program services such as radio and television broadcasts, and any other communication service by means of the transmission of electrical impulses. Pac. Tel. & Tel. Co. v. City of Los Angeles (1955) 44 Cal.2d 272, 281-2. Notwithstanding this position, the ILEC, who is currently installing DSL facilities for data transmission is allowed to pull permits in these cities with abandon.

These cities refused to grant MFNS permits to construct in the public rights-of-way, or even to simply pull fiber through existing ILEC conduit. MFNS was forced to sign settlement agreements with them waiving MFNS' rights to challenge the unlawful compensation, agreeing to pay them annual linear foot fees in order to obtain access to the rights-of-way. MFNS' payments to these cities over the term of the agreements will likely total over \$100,000.

- MFNS sought a permit from the City of **Dearborn, Michigan** in March of 2000. In May the City advised MFNS that it would have to sign the City's "Franchise Agreement", requiring MFNS to pay a percentage of its gross revenues to the City and to agree to many unlawful extensions of municipal authority over telecommunications providers like MFNS. *Dearborn made this demand despite the fact that its gross*

*revenue fee had already been struck down by a state court, finding it violated the state telecommunications law limiting fees to actual costs of issuing a permit and maintaining rights of way used by the provider. See TCG Detroit v City of Dearborn, Case No. 98-803937 CK, Opinion and Order issued June 11, 1999. To date, nearly a year after MFNS submitted its permit application, and nearly nine months after the running of the state's 90-day statutory deadline (M.C.L. 484.251(3)), the City still has not issued MFNS a permit. MFNS is taking formal action against the City at this time.*

- The City of **Chandler, Arizona** has claimed that certain services provided by MFNS do not qualify under the state's definition of "telecommunications services," which mirrors the federal definition. Although state law prohibits a city from charging right-of-way access fees to providers of "telecommunications services," and although MFNS is certificated in Arizona as a telecommunications provider, MFNS must pay a fee of \$1.47 per linear foot to access Chandler's rights-of-way. MFNS must also act as the City's "contractor," installing additional conduit and manholes for the City's use, with Chandler's compensation to MFNS limited to the incremental construction costs incurred by MFNS. These fees and requirements are not imposed on the ILEC, Qwest Corporation.
- The city of **Phoenix, Arizona** has required MFNS to install a complete conduit and manhole system for the City in exchange for access to the City's rights-of-way. The City has continued to require these in kind contributions even though state law provides that intrastate providers of "telecommunications services" are not required to pay for access to public rights-of-way. Thus far, this system has cost MFNS over \$3 million. Additionally, the City has demanded that MFNS pay an annual access fee of \$.76 per



linear foot. To date, the City has not imposed access requirements of this magnitude on other providers of telecommunications services, including the ILEC, Qwest Corporation.

- The city of **Raleigh, North Carolina** has also rejected state law that prohibits it from charging for access to its public rights-of-way. The most recent agreement provided for MFNS' review by the City requests that MFNS make quarterly payments to the City of 2% of its gross revenues for use of city streets. MFNS already compensates cities for use of their rights-of-way through a state tax scheme whereby a portion of the proceeds are remitted to the cities by the State. The agreement is attached as Exhibit A.
- **Jefferson Parish, Louisiana** is permitted to charge for access to rights-of-way under state law. It currently collects the greater of \$2.60 per linear foot or 5% of gross revenue annually for use of city streets. Notwithstanding that this is one of the highest fees in the country, the Parish also insists on collecting a one time charge of \$1.50 per linear foot allegedly for compensation for costs incurred in managing its rights-of-way. However, the fee is simply another opportunity to extract money from anxious carriers, as evidenced by the fact that the Parish imposes this fee on *state* rights-of-way for which the Parish has no ownership, management, or control. MFNS' formal protest of this fee is attached as Exhibit B.
- MFNS has encountered extraordinary delays and obstacles in constructing its network in **Boston, Massachusetts**. This is particularly surprising given the fact that the City had previously developed a policy governing the construction of new telecommunications conduit as a result of the competitive access provider boom of the 1980s. At that time, Boston adopted a "shadow conduit" policy requiring

telecommunications utilities building new telecommunications conduit to implement joint builds to accommodate other carriers and to install excess conduit as a condition of excavating in public rights-of-way. This excess or “shadow conduit” had to be given to the City and the City obtained the ability to lease the “shadow conduit” to future market entrants. Consequently, the City now has an abundant supply of empty conduit available to lease to telecommunications providers. Nevertheless, the City refused to process MFNS’ “shadow conduit” application (filed originally on October 30, 1998), while allowing the ILEC to construct new conduit and allowing the affiliate of an electric utility to install fiber in existing electric conduit. If MFNS’s original application had been granted, it would have been required to make an upfront installation payment to the City of between \$2.5-3.0 million, for 33,568 total duct feet (4 one and one quarter inch ducts), in addition to an annual rent fee of \$5.00 per linear foot (subject to increase in the future). In December 1998, MFNS pared down its prior application, but would still have had to pay the City over \$1.4 million upfront for a reduced amount of construction.

MFNS counsel was advised by the City Law Department that its application would not be considered until after the City promulgated a new fees policy covering all conduit in Boston. However, at the same time, the City held hearings on new conduit construction applied for by another carrier in some of the same locations MFNS had applied to use “shadow conduit.” Despite repeated requests for rights-of-way access and an opportunity to comment on any proposed policy, the City refused to process MFNS’s application and failed to share any information about the new policy with MFNS and other CLECs. The City did share information regarding the new policy

with both the ILEC and the electric companies (see December 23, 1998 *Wall Street Journal* at NE1, NE4.).

The City eventually adopted a new telecommunications policy in June of 1999. It requires that all carriers become “certified” by the City and provide documentation similar to the state certification process, essentially reproducing on a smaller scale work already performed by the state utility commission.

Most significantly, between approximately October 1998 and August 1999 the City prevented a number of CLECs, including MFNS from entering the telecommunications market, violating Section 253 of the Act and substantially delaying market plans, all to the benefit of the ILEC.

Additionally, the “shadow conduit” policy raises troubling issues. Setting aside the legal issue of whether the City can demand “shadow conduit” from new conduit builders and then charge for its use, both the cost of providing “shadow conduit” to the City in the event of a new build, and the “shadow conduit” rental formula constitute economic barriers to entry. In MFNS’ case, an application to construct new conduit would burden MFNS with either expensive joint build or “shadow conduit” installation requirements. Under the rental formula, a carrier only gets to use **one** conduit, but is required to pay the City an upfront fee computed as the CPI-adjusted equivalent of the “certified” construction costs of **four** conduits. The carrier must then pay an annual rental fee of approximately \$5.00 a linear foot for **one** conduit – a conduit that the carrier has already paid four times the construction costs for!!

- In the Town of **Arlington, Massachusetts**, MFNS sought to place fiber in existing conduit in the public rights-of-way, construct a segment of its own conduit, and cross a

portion of the public rights-of-way that intersected a railroad crossing, permitting MFNS to access a state-controlled bike path that ran through the municipality. MFNS contacted the Town Manager on April 23, 1999 to discuss its plans and filed its initial permit application on August 13, 1999. MFNS proposed that the Town issue it the same order that the Town had routinely issued to the ILEC.

In response to MFNS permit application, the Town Manager demanded **\$2 million** as a condition of issuing MFNS the order, and referenced the need for new ballfields in the community. The Town Manager also asserted authority over the state-controlled bike path and refused to allow any public hearings on MFNS' application. After extensive delays by the Town and intervention by the state agency that owns the bike path, the Town Manager allowed MFNS to move forward pursuant to an "agreement" that required MFNS to make a \$200,000 payment to the Town and waive its right to contest the legality of this payment requirement. Again, the ILEC is not subject to these types of delays and demands when it applies to install new conduit or make additional use of existing conduit. MFNS did not reach "agreement" with the Town until nearly a year after its initial application.

- MFNS filed its first application in **Newton, Massachusetts** on July 6, 1999, and has experienced extensive delays since then. At its initial meeting with City officials on April 28, 1999, MFNS agreed to accept the same conditions imposed upon the ILEC. This proposal was unacceptable to the City and several problems arose as a result. First, the City demanded that MFNS answer a number of questions posed by the Law Department. MFNS did so. MFNS was then delayed while the City tried to determine what requirements it wanted to impose on MFNS, despite the fact that the City

ordinance did not provide for economic compensation. Ultimately, the City required MFNS to make a lump sum **\$100,000** “voluntary” payment to the City. This fee was not included in the public conditions accompanying the grant of location order. The City also required MFNS to install, at no cost to the City, conduit for municipal use. In addition, it imposed street excavation and restoration standards that exceeded those mandated by the Massachusetts Department of Telecommunications and Energy, further increasing MFNS’ construction costs and delaying its project. Finally, the City required MFNS to waive its legal right to challenge the conditions imposed, as well as the \$100,000 payment to the City. MFNS did not obtain approval of its first application until March 14, 2000.

- **DuPage County, IL** proposed charging MFNS a fee of over \$1 million dollars to install fiber in approximately seven miles of existing ILEC conduit. This fee is clearly illegal under several provisions of the Act and state law. First, the fee is discriminatory because it has not been imposed on the ILEC, Ameritech. Second, if the County had insisted on immediate payment, it would have had the effect of preventing MFNS from providing telecommunications service in violation of section 253(a) of the Act because of its breathtaking amount. Finally, over \$1 million (or approximately \$27.00 per foot) for the right to occupy less than 7 miles of existing conduit is clearly not “fair and reasonable compensation” consistent with section 253(c). In order to proceed with its fiber installation, MFNS was able to post a bond for the bulk of the fee, pending litigation on the issue. However, the fee remains, and MFNS will be forced to incur substantial legal costs, or pay the fee shortly

- Despite a recent change to Washington state law preventing **Washington Municipalities** from requiring free conduit from providers,<sup>13</sup> many still make the demand. In some cases, the cities are willing to waive permit fees for the conduit. Others, with utter disregard to state law, continue to demand conduit in addition to the required permit fees.
- MFNS has encountered demands for illegal fees **throughout New Jersey**, despite a 1997 legislative enactment limiting fees to cost-based recovery. The law bars any "fees, taxes, levies or assessments in the nature of a local franchise, right of way, or gross receipts fee, tax, levy or assessment against ... telecommunications companies," and further limits permit fees to "reasonable fees for actual services made by any municipal, regional or county governmental agency." N.J.S.A. 54:30A-124. Specific examples of "bad actor" cities in New Jersey include the following:
  - For more than a year MFNS attempted to obtain permission from **Trenton, N.J.** to build a network of rings in the downtown area, that would have entailed occupying about 40,000 feet of municipal right-of-way. Trenton insisted on street opening permits equivalent to \$25.00 per foot, which would have required a permit fee in excess of \$1 million. As a result, MFNS was forced to defer its plans to build in Trenton.
  - MFNS approached another New Jersey city about a proposed build of approximately 5 miles in June 2000. Newark informed MFNS that it would require a fee of \$70,000 *per year* for this build, despite state law limiting fees to cost recovery. The City also stated that it would require MFNS to install 8

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<sup>13</sup> R.C.W 35.99.070.

additional ducts to be granted to the City, at no cost. As of this writing, there has still been no agreement achieved between the City and MFNS.

- Despite state law limiting fees to actual services rendered, **both Monmouth County and several municipalities within Monmouth County**, after consultation among themselves, have concluded that an appropriate fee is \$1.50 per foot per year. This fee is producing tens of thousands of dollars in recurring revenue to each of these jurisdictions, despite the fact that after the year in which construction occurs, the only cost to the County or any of these municipalities is the file space to store "as built" drawings.
- One **New York municipality** charges as much as \$4 per foot per year for use of the public right-of-way claiming that is the estimated fee to administer and maintain the road after facilities are installed even though MFNS is required to fully restore the streets. As stated in the Introduction, MFNS is working to complete networks in 50 US markets in the next several years. These networks traverse hundreds of Municipalities. In all of the other markets that MFNS is building and with all of its experience in this area, MFNS has never found that cost recovery even comes close to \$4 per foot per year. This fee is not fair and reasonable.
- The cities of **Burbank** and **Glendale, California** both require competitive carriers to sign agreements agreeing to pay fees for use of the rights of way. Burbank's fees are over \$3.00 per linear foot annually. Glendale claims its fee is "cost-based" to avoid the state law prohibition on franchise fees. However, the City reserves the right to charge carriers up to \$1.80 per linear foot annually. Clearly, the City does not incur annual fees of this magnitude once facilities are installed and it is only left to "administer" an

agreement. Even more troubling, MFNS has signed the *exact same* agreement executed by another CLEC, and both cities have thus far dragged their feet on processing approval of the agreement.

#### **IV. MUNICIPALITIES ROUTINELY PREVENT THE PROVISION OF TELECOMMUNICATIONS SERVICES THROUGH PERMITTING MORATORIA**

It is no exaggeration to say that nearly five years after the Act, Municipalities routinely impose both official and unofficial permitting moratoriums that prevent installation of new telecommunications facilities for over a year, pending adoption of new telecommunications ordinances or to appease perceived citizen outrage. In addition to preventing the provision of telecommunications services and the resulting customer benefits, these moratoriums are often discriminatory in that they are rarely applied to other utilities, including the incumbent telephone company.

- On April 19, 2000, the city of **Berkeley, California** rejected MFNS' permit requests, claiming that, contrary to state law that prohibits a Municipality from franchising telephone companies, MFNS was required to obtain a franchise from the city. See Berkeley's permit rejection letter, attached as Exhibit C. To add insult to injury, Berkeley also refused to negotiate a settlement agreement of this issue, instead deciding to institute an informal moratorium on all telephone company permits.<sup>14</sup> Nine months after originally rejecting MFNS' permit requests, Berkeley is now in the final stages of adopting an overreaching and illegal telecommunications ordinance that literally amounts to a third tier of regulation. It is attached as Exhibit D. Most discouraging,

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<sup>14</sup> It is likely that this moratorium does not apply to the ILEC, but MFNS has not yet conducted public records searches to verify this.



the ordinance requires carriers to “register” with the city and participate in an extensive process for determining whether the carrier is “exempt” from a franchise. As MFNS has had experience with a similar ordinance written by the same attorney for another California, it is clear that this “registration” and “exemption” process can take months unless a carrier simply agrees to pay fees to keep the process moving. Among other things, the ordinance imposes illegal rental fees to access the rights-of-way (the amount of the fees is not yet determined) (Section 16.10.040, *et seq.*); requires a carrier to submit to a technical audit of its system in the event of a system transfer (Section 16.10.120(E)); and requires carriers to provide information about their “technical qualifications, experience and expertise regarding the Telecommunications System and Telecommunications Facilities.” (See Sections 16.10.040 and 16.10.060(10) of the Berkeley Ordinance that is attached). The last two requirements unquestionably extend far beyond the city’s jurisdiction and have the effect of creating unnecessary additional “hurdles” to installation of facilities. Among other things, a carrier’s fitness to construct and operate a telecommunications system is determined by the state regulatory commission and Municipalities are preempted from making their own determinations on this subject.<sup>15</sup> Most significantly, after more than nine months of discussions with the City, at this writing, MFNS is still unable to access Berkeley’s public rights-of-way.

- **Culver City, California** has had an “informal” moratorium on issuing telecommunications carrier permits since at least July 1999. In essence, the City

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<sup>15</sup> “These factors [managerial, technical, financial and legal qualifications] relate to regulatory issues that go well beyond the bounds of legitimate local governmental regulation discussed in *TCI Cablevision* and *Classic*

refuses to process any permit applications until it has adopted a comprehensive telecommunications and franchising ordinance. The City's refusal to process permits has forced MFNS and other carriers to route around this city for the time being.

- Notwithstanding the fact that as recently as 1995 the Kansas Supreme Court affirmed that a Kansas Municipality could not require a franchise from a telephone company "passing through" a jurisdiction (*United Tel. Co. v. City of Hill City*, 258 Kan. 208, 899 P.2d 489 (1995)), a number of **Kansas Municipalities** have decided to reexamine their franchise ordinances in an attempt to challenge this law. In the interim, they have imposed unofficial permitting moratoria and denied permits to MFNS for failure to have a franchise. They have taken this position despite the fact that many of these same Kansas Municipalities previously refused to respond to MFNS' requests in June, July and August of 2000 to obtain a franchise. The Kansas Municipalities' newly asserted franchise requirement is especially ludicrous in light of one Municipality's articulated position that the Act, or alternatively this Commission's decision in *Classic Telephone*, has "overruled" the Kansas Supreme Court's determination in the *Hill City* case. Perhaps the Commission can appreciate the irony of a Municipality arguing that clearly articulated state law is preempted by federal law or a federal agency determination when Section 253 of the Act specifically retains states' rights to manage public right-of-way. While it might be satisfying to MFNS litigators to put such amusing claims to the test, there is nothing amusing about the delays that the Kansas Municipalities have caused for MFNS. MFNS is in the process of completing

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*Telephone*, supra." *Bell Atlantic – Maryland, Inc. v. Prince George's County, Maryland*, 49 F. Supp. 2d 805, 817 (1999).

installation of a fiber optic ring in the Kansas City metropolitan area. This ring would be complete and MFNS would be providing service over the ring today if not for Municipal delays, and now, extortion. There is simply no time to test these issues with the Commission or the courts – too much is at stake. Consequently, customer commitments will likely force MFNS to enter franchises and pay fees to “pass through” Municipalities that would otherwise have no right to a franchise, or fees, from MFNS.

**V. MUNICIPALITIES DELAY PERMITTING AND DISCRIMINATE AGAINST COMPETITIVE CARRIERS BY IMPOSING EXCESSIVE REGULATORY BURDENS**

Regulatory burdens generally take one of two forms. They are either designed to keep carriers out of the rights-of-way for as long as possible, or they are designed to extract as many public works benefits as possible. Some Municipalities require carriers to coordinate joint trenching among competitors that unreasonably delay projects. Others routinely use carrier construction plans to obtain street and sidewalk improvements, generally through restoration standards that require carriers to improve the street or sidewalk to a *better* condition than found. Clayton, Missouri provides an especially egregious example of this tactic.

Some examples provided throughout these comments describe demands for excessive in-kind compensation. Demands for in-kind compensation represent both an excessive regulatory burden and often unlawful compensation. In-kind compensation, as in the case of Phoenix, Arizona, can amount to a huge expense to the company, and should be evaluated by applying the fair and reasonable compensation standards of section 253 of the Act. MFNS requests that the Commission make such a finding in the proceeding.

- The city of **Clayton, Missouri** presents a textbook example of the imposition of unreasonable regulatory burdens on carriers seeking access to the rights-of-way. The City clearly views the advent of telecommunications competition as the opportunity to complete a number of public works projects, including upgrading of certain city sidewalks and accompanying streetscapes. Instead of allowing carriers to construct in the street along Maryland Avenue, the City is requiring a number of carriers to joint trench together in the adjoining sidewalk. Under normal circumstances, this would not be objectionable. However, as a condition of excavating the Maryland Avenue sidewalks, the carriers must meet excessive restoration requirements that include replacing a concrete sidewalk with brickwork, and installing trees and other public improvements. In summary, the city has adopted the attached architectural specifications (Exhibit E) as its restoration standards for that street, raising linear foot construction costs by more than \$40.00 per participant in the joint trench.
- The city of **Federal Way, Washington** requires carriers to pave 500 feet of road on either side of a new manhole. There is simply no structural justification for such a large amount of overlay.
- The city of **Brier, Washington** required MFNS to not only install new street curbs and gutters, but to install sidewalks where previously there had been no infrastructure.
- MFNS recently sought an easement over publicly owned park property in **Medina, Washington**.<sup>16</sup> The City's outrageous demands would be laughable, were they not so indicative of the manner in which Municipalities view carriers – as large companies

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<sup>16</sup> MFNS recognizes that it does not have the same rights to publicly-owned property that is not public rights-of-way, but presents its experience in Medina, WA for the proposition that, among other things,

with unlimited resources that the Municipality can extract because of the value of the property they control. Medina's first set of demands included 16 items, among them:

- 8 fibers dedicated for City use;
- Free long distance;
- Free high-speed internet service to all Medina citizens;
- A "best price" guarantee for all Medina citizens;
- An annual easement fee of \$250,000;and
- An institutional network connecting City Hall to all current and future City facilities.

The list of demands presented to MFNS is attached as Exhibit F. At this time, while the City has substantially reduced its demands, MFNS and its construction partner have determined that it is more feasible to obtain the easement from a private property owner. Thus far, the City has refused to provide MFNS with even a sample franchise agreement. Consequently MFNS is concerned that its decision to bypass the City park property will result in retribution in the form of franchise delays.

- Some Municipalities reserve space for planned projects, even if they are unfounded and far into the future. One **Washington Municipality** forced MFNS to construct on the sidewalk claiming the streets are reserved for city utility use.<sup>17</sup> In addition to instituting discriminatory policies prohibited by 253(c) in favor of the municipality owned utilities, the municipality used MFNS as a public works subcontractor requiring it to install a new sidewalk at additional expense to MFNS.

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Municipalities have unreasonable expectations of carriers resources and don't hesitate to attempt to extract all manner of things. The unique thing about Medina is that the city actually put its requests in writing.

<sup>17</sup> Compare with *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Service Providers*, CC Docket No. 96-98 and 95-185, para. 9 (1999) that states utilities are not permitted to reserve space for pole attachments to the detriment of a would-be entrant. As a bottleneck facility, Municipalities should not be permitted to reserve public right-of-way space for future projects especially if they are unfunded.

- **Joint trenching/build requirements** – Increasingly, Municipalities are requiring carriers to coordinate their construction with all other carriers who may seek to install facilities along the same route within a 2-5 year period. Although MFNS understands the desire to minimize construction and generally supports joint builds, many joint builds are burdensome on smaller companies such as MFNS. Joint build regulations require MFNS to canvass all *possible* companies that *might* want to occupy a particular route. This canvassing takes months. Some municipalities require an affirmative response from all *possible* companies (compared to requiring response by a date certain). In many cases it is difficult, if not impossible, to obtain affirmative responses, but the Municipality will not issue permits until MFNS provides such affirmative responses. MFNS suggests that such a position by a Municipality is unfair, costly and violates sections 253(a) and(c) of the Act.
- One **Washington Municipality** requires MFNS to notify all utilities that have aerial plant of our construction plans so they can move their facilities underground. The notification period is 60 days. Of course additional time is then required to negotiate a joint build agreement. Time to market is crucial for competitive providers such as MFNS. If moving facilities underground is important to cities, they should set a deadline for such a change and work with the utilities to implement the change. The Municipalities should not wait until a provider has an immediate need to access the public right-of-way and then place conditions on the provider that significantly delay construction.

## **VI. MANY MUNICIPALITIES UNREASONABLY DELAY OR IGNORE STATUTORY DEADLINES**

As stated in the City Signal petitions, the Defendant Cities failed to meet the statutory deadline of responding to permit applications within 30 days along with other violations of section 253. City Signal continues by stating that this failure to respond “is tantamount to a denial of the application.”<sup>18</sup> MFNS agrees with City Signal that blatant disregard for the statutory obligations of the Defendant Cities’, as demonstrated in City Signal’s petitions, is tantamount to a denial and an abuse of the Defendant Cities’ authority.

To make matter worse, Exhibit A of the Wickliffe petition indicates that the city’s Chuck Webster told City Signal that if they wanted a “30 day” answer, the city could simply reject the application.<sup>19</sup> This example of a “my way or no way” attitude is an unfortunate reality in dealing with many Municipalities as reflected in the other examples provided by MFNS in these comments. Imagine the response in the majority of Municipalities, where no statutory deadlines exist. As described in the examples contained herein, delays last months, and even years.

The City Signal situation is clear-cut. Governments set statutory deadlines for good reason. If the Defendant Cities feel that 30 days is too short in order to respond to permit applications, the proper course of action is to ask the state Legislature to change the law so that a longer time is permitted. The proper course of action is NOT to ignore the statutory

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<sup>18</sup> Contrast with “a pole owner ‘must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted.’” *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, DA 00-1250, para. 15, (1999) quoting *In the Matter of Application of Bellsouth Corporation*, FCC 98-271 13 FCC Rcd 20599 (1998).

<sup>19</sup> See Exhibit A of Wickliffe petition, July 25 entry. A rejection such as suggested by Mr. Webster would also be a violation of section 253(c).

deadline and threaten rejection to those that seek a response in the legally mandated timeframe.

The Commission must make it clear to all Municipalities, including the Defendant Cities, that they are expected to work cooperatively with carriers to enable access to the public right-of-way in an appropriate amount of time and that, like pole attachments, “time is of the essence and dilatory cooperation is as effective as denial.”<sup>20</sup>

To demonstrate how many Municipalities abuse their position to delay access to the public right-of-way, MFNS offers the following additional examples:

- MFNS applied for a statutory permit under the Michigan Telecommunications Act (“MTA”) from the City of **Centerline, Michigan** on March 30, 2000. The statute, enacted in 1995, requires local units of government to act on such requests within 90 days. M.C.L. 484.251(3). However, the City refused to issue MFNS a permit until it had drafted and passed an entirely new telecommunications regulatory ordinance. The new ordinance, consisting of over 40 pages, conflicted with and violated the state telecommunications law in many respects. Although the 90-day statutory period expired in June, 2000, the City did not pass its ordinance until August and did not issue MFNS a final permit until October, 2000, nearly four months after the statutory deadline, and only after MFNS was forced to engage in protracted and lengthy negotiations costing MFNS thousands of dollars in unnecessary costs and delays.
- MFNS first applied for a grant of location to construct new conduit in the Town of **Winchester, Massachusetts** on May 21, 1999, after MFNS had extensive pre-

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<sup>20</sup> Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Company, Docket No. DA 99-1376, para. 16 (1999).



application discussions with municipal officials about its construction plans and proposed routes. MFNS proposed to use the same form of grant of location order used by the Town in granting conduit construction applications to the ILEC. The Board of Selectmen refused to treat MFNS the same as the ILEC and delayed issuance of MFNS orders. The Board of Selectmen instructed the Town Conservation Commission not to allow any MFNS filing to proceed to hearing pending its “discussions” with MFNS. Delays caused by the Board of Selectmen forced MFNS to miss an entire construction season. MFNS had timed its application to enable it to complete its construction during those months when local schools were not in session. The Town ultimately required MFNS to make monetary payments not authorized under state law and provide in-kind contributions, including laterals to several municipal buildings and fiber optic cable for municipal use, in addition to installation of a single duct reserved for municipal use, all at no cost to the Town. The ILEC is only required to provide duct for municipal use. The Town also imposed a bond amount that exceeded its standard requirements applied to the ILEC. No written by-law supported the imposition of these conditions, which were not part of any publicly known or applied requirements. MFNS did not receive an affirmative vote on its permit application until August 7, 2000 – more than 1 year and 2 months after its initial application.

- MFNS has encountered significant delays to market entry **throughout New Jersey**.

Delays are especially troubling in New Jersey because the State has hundreds of small municipalities, so even a relatively modest project will require approval from many jurisdictions, any one of which can effectively block the project through delay.

- In June 2000, MFNS approached the city of **Bayonne, N.J.** to discuss a small construction project traversing approximately thirty city blocks. In August, having received no response to the June application, MFNS' counsel reiterated the request. In response, in September, the City attorney requested a copy of the June request, which had been misplaced. MFNS responded four days after the request was made. In January 2001, approximately four months after the replacement application was provided, and more than seven months after the first request was made, the City attorney requested copies of resolutions issued by other jurisdictions. While these were provided promptly, it is evident that this will provide an excuse for yet further delay, as the "new information" is reviewed.
- MFNS approached **Rochelle Park, N.J.** to discuss a small build in June 2000. The Borough attorney requested additional information, which was provided in July 2000. Just recently, more than 4 months after MFNS' initial submission, and after repeated inquiries by MFNS, the Borough attorney requested fresh copies of the material previously provided in July 2000.
- One state DOT takes up to 8 months to process a permit. Although this is a significant and unreasonable delay, this is not isolated to one particular DOT or Public Works Department. The DOT has one person that reviews permit applications and calculates fees for the entire state. If he is on vacation or out sick the permits just pile up until he gets back.

## **VII. WHERE THINGS ARE WORKING**

### **A. Texas**

An example of where right-of-way access is beginning to show promise is Texas. In 1999, Texas passed unique legislation dispensing with municipal franchise requirements for certificated telecommunications providers (“HB1777”). Fees for use of public rights-of-way located within a municipality are calculated pursuant to a legislative formula and implemented by the Texas Public Utility Commission (“TPUC”). Providers in Texas are expressly authorized to pass the fees through to end-use customers on customer bills.<sup>21</sup> Texas municipalities retain police power to manage the public right-of-way. Specifically, municipalities are authorized to require a telecommunications provider to obtain a construction permit before it is authorized to install facilities in the public rights-of-way. Some implementation issues have arisen such as permit application forms, insurance and bonding requirements, time to issue a permit, and fees for providers that do not terminate access lines in the municipality.

To demonstrate further the PUCT’s commitment to providing access to the public rights-of-way, the PUCT has two staff members dedicated to the administration of HB1777 and the propagated regulations. These staff members answer questions regarding requirements of carriers and Municipalities and make telephone calls in an attempt to move parties off positions that are not lawful under HB1777 so that construction can move forward.

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<sup>21</sup> Such a method begins to reveal to customers the real cost of service which is often masked or subsidized. It also requires tax authorities to stop hiding behind the utilities that traditionally have been heavily taxed and included the taxes into service costs thereby hiding a customer’s true tax burden.

The situation in Texas is not perfect – yet. But given the underlying legislation and the TPUC’s willingness to continue to fine-tune the process as issues arise, and to dedicate staff to explain the law to the Municipalities, Texas proves to be a model for all states in its right-of-way management.

**B. Illinois**

Another example of where things are working is Illinois. Effective January 1, 1998, Illinois enacted the Telecommunications Municipal Infrastructure Maintenance Fee Act (35 ILCS 635) (“TIMF”). The Illinois General Assembly imposed a tax on invested capital of utilities to partially replace the personal property tax that was abolished by the Illinois Constitution of 1970. The TIMF abolished the invested capital tax on telecommunications retailers and franchise fees with respect to telecommunications retailers to create a uniform system for the collection and distribution of fees associated with the privilege of use of the public right of way for telecommunications activity, and provide municipalities with a comprehensive method of compensation for telecommunications activity including the recovery of reasonable costs of regulating the use of the public rights-of-way for telecommunications activity.<sup>22</sup> The fee is charged to end user customers. The state TIMF rate is 0.5 percent of gross charges. The municipal TIMF cannot exceed 2% in the City of Chicago and 1% in all other municipalities.

Except for the problems outlined above in DuPage County, the TIMF has produced simplified processes that generally permit MFNS to obtain permits in a timely and cost-effective fashion and complete construction to satisfy customer requirements.

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<sup>22</sup> 35 ILCS 635/5.

Because the state legislature had the foresight to develop a simple and straightforward scheme, Illinois customers have benefited from the promises of the Act.

#### **VIII. ACTION THE FCC CAN TAKE TO HELP THE BALANCE THE NEEDS OF CARRIERS AND MUNICIPALITIES**

In these proceedings, MFNS urges the Commission to set forth the sphere of local authority to regulate access to the public right-of-way, including what constitutes appropriate time, place and manner of right-of-way management. The Commission should make it very clear to all Municipalities that actions of the Defendant Cities and the other Municipalities contained in these comments will not be tolerated. The Commission should also make clear that forcing carriers to turnover customer lists and technical information is completely outside the scope of necessary right-of-way management.

As suggested in footnote 2, and to the extent the record requires further development, the Commission should initiate a formal rulemaking proceeding to establish right-of-way access standards. To the extent the Commission determines that such issues are outside the scope of this proceeding, the rulemaking should spell out for such things as time to respond to permits, what constitutes a fair and reasonable fee, establish accelerated dispute resolution for violations of 253, and declare a mandatory waiver of rights under Section 253 of the Act a per se violation of the Act.

The Commission should clarify that the Enforcement Bureau has jurisdiction over section 253 issues and make the escalated dispute resolution process, "Rocket Docket", available for this matters as well as informal mediation by the Enforcement Bureau staff. The Commission should also consider dedicating staff to resolving right-of-access access issues as has been done by the PUCT.

## **IX. CONCLUSION**

MFNS is sensitive to the fact that the Commission takes its preemption authority seriously under section 253 (d) and uses it only when necessary. MFNS agrees that preemption of a Municipal law or regulation is a serious action that should be used only in extreme circumstances. The circumstances presented to the Commission in these petitions warrant such action.

MFNS also acknowledges the Commission's efforts to eliminate the "digital divide" in the United States. Although much of that effort is directed to rural areas, the Commission must continue to monitor deployment of high-tech infrastructure in major cities or some Municipalities may slip behind the digital divide because their right-of-way policies discourage investment in the community. Although some consider Cleveland Heights an affluent community, it will not remain such if it continues to be a barrier to entry to such competitive carriers as City Signal and MFNS. The Commission must be diligent in its attempts to remove the digital divide from *all* American neighborhoods by ensuring that no Municipality may prevent a carrier from providing facilities and service in their Municipality.

Respectfully submitted,

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Dated: January 30, 2001

## CERTIFICATE OF SERVICE

**I hereby certify that copies of the foregoing Comments of Metromedia Fiber Network Services, Inc.** were served via overnight delivery on this 30<sup>th</sup> day of January, 2001 of the following:

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/s/ Karen Nations  
Karen Nations

Dated: January 30, 2001



**EXHIBIT A**  
**Raleigh, NC Proposed License**



# TELECOMMUNICATIONS LICENSE 2000 - X

This License is issued by and between the City of Raleigh, a North Carolina municipal corporation, herein after the "City," and XX XXXXXXXXXXXXXXXX, Inc., herein after "Grantee," a North Carolina corporation qualified to do business in North Carolina.

**WHEREAS**, the City desires to assure the widespread availability of Telecommunications Services within the City to promote commerce and otherwise further the public interest;

**WHEREAS**, the City seeks to ensure that the telecommunications infrastructure deployed within the City enables all people to effectively exercise their fundamental rights to pursue and exchange information;

**WHEREAS**, the City desires to assure that telecommunications providers shall interconnect their facilities to offer unrestricted access to other information networks;

**WHEREAS**, the City is the owner of certain public rights-of-way;

**WHEREAS**, the Grantee wishes for its sole interest and convenience to construct and lease a fiber optic, coaxial and multi-pair cables along portions of the City's right-of-way; said areas being more fully described in Section 1; and

**WHEREAS**, the City, under the terms and conditions set out herein, permits the requested construction of primary telecommunications and lease of third party telecommunications facilities in accordance within Section 1.

**NOW, THEREFORE**, the City of Raleigh ("City") hereby grants to XX XXXXXXXXXXXXXXXX, Inc. ("Grantee") a Telecommunications License ("License") authorizing the Grantee to use the public way for the construction and deployment of Telecommunications Network(s) (Telecommunications Network") for the privilege of providing telecommunications services to businesses and residents within and outside the City.

## Section 1. Nature and Terms of Grant

- A. The City does hereby convey to the Grantee a license to operate a Telecommunications Network, using constructed, owned and leased facilities, in the City rights-of-way.
- B. Notwithstanding the preceding, Grantee is awarded a license to construct and lease fiber optic, coaxial and multi-pair cable and other telecommunication facilities from Licensed Providers throughout the City.
- C. Grantee is given the right to operate its Telecommunications Network, as defined in Section 1(A.) for a ten (10) year term, and may be renewed for two (2) consecutive terms, subject to the conditions of then current City ordinances, public right-of-way use conditions, and encroachment policies. The initial term shall commence on the date this License is executed by the City.

## **Section 2. Definitions**

For the purposes of this License, the following terms, phrases, and their derivations shall have the meanings given below unless the context indicates otherwise. When inconsistent with the context, words used in the present tense include the future tense, words in the plural include the singular, and words in the singular include the plural.

- A. **Gross Revenues** means revenues from the provision of Telecommunications Services within the City as defined in Section 2.B. As used in this Section, gross revenues shall mean all revenues, exclusive of sales tax, collected by the Grantee from operations of Grantee's Network and any related services provided by the Grantee within the corporate limits of the City.
  - 1. Gross Revenues shall include:
    - a. a prorated share of services originating in the City and terminating outside of the City;
    - b. a probated share of services originating outside the City and terminating within the City;
    - c. a full share of services originating and terminating within the City;
  - 2. Gross Revenues shall be calculated upon:
    - a. all telecommunication service revenues levied on a usage rate basis;
    - b. all telecommunication services levied on a usage sensitive or mileage basis;
    - c. all revenues from installation charges;
    - d. all revenues collected from connection or disconnection fees;

- e. all revenues from penalties or charges to customers for checks returned from banks, net of bank costs paid;
  - f. all revenues from equipment sold or rented to customer for use on customer premises. (Equipment sold is exempt, if purchaser paid sales tax.);
  - g. all revenues from local service;
  - h. all other revenues collected by Grantee from business pursued within the City;
  - I. recovery of bad debts previously written off, and revenue from sales of assignments of bad debts. Unrecovered bad debts charged off after diligent, unsuccessful efforts to collect are excusable from gross revenue computations; and
  - j. the value of any bartered services provided by the Grantee, except those free services required under the License.
3. Specifically exempt from the Gross Revenue calculations are:
- a. funds acquired for capital construction activities to improve or expand Grantee's Telecommunications Network;
  - b. interstate carrier access fees;
  - c. usual and customary telecommunication infrastructure lease payments to a telecommunication provider licensed by the City; and
  - d. usual and customary telecommunication infrastructure lease payments received by the Grantee from another Federal, North Carolina or City of Raleigh licensed telecommunications provider.
- B. **Licensed Providers** shall mean telecommunication providers certificated by the Federal Communications Commission and/or the North Carolina Utilities Commission and the City.
- C. **Public way and right-of-way** shall also mean the surface of, and the space above and below all streets, avenues, boulevards, roads, alleys, lanes, squares, bridges, viaducts, tunnels, causeways, and sidewalks, lying within the rights-of-way, and all other public highways within the City.
- D. **Telecommunications Network** means all wire and fiber cables, wireless transmission devices, and other necessary facilities and other property owned or leased by the Grantee for purposes of providing voice, video or data transmission Telecommunications Services.
- E. **Telecommunications Services** shall mean voice, video or data transmission over the Telecommunications Network, the lease of the Network or Services to third-party resellers, or other access or private line service. Grantee shall not provide a cable network or provide video

programming, as defined by Section 602 of the Cable Communications Policy Act of 1984 (47 U.S.C. Section 522).

- F. **Used for** shall also mean arranged for designed for, intended for, maintained for, and occupied for.
- G. **Year** shall mean a calendar year.

### **Section 3. Compensation and Auditing**

- A. The Grantee shall pay the City of Raleigh throughout the term of this License, as compensation, a license fee of two percent (2%) of Grantee's Gross Revenues, on a **quarterly basis**, within forty-five (45) days following the end of each quarter. The license fee is assessed on Licensed Providers operating within the City. In the event 2% of Grantee's Gross Revenues is less than five thousand dollars (\$5,000) in any single calendar year, Grantee shall pay to the City a total of five thousand dollars (\$5,000) for that calendar year with the balance due within (45) days following the end of the fourth quarter.
- B. The annual License Fee is compensation to the City in consideration of the Grantee is for the right to operate its Telecommunications Network within the public way, and is in lieu of an encroachment fee payment.
- C. The Grantee shall furnish an annual statement to the City by March 1 of each year, certified by an official of the Grantee responsible for the Grantee's financial statements, reflecting the total amounts of Gross Revenues as defined herein, and all payments, and computations for the previous calendar year. Upon ten (10) days prior written notice, the City shall have the right to conduct an independent audit of Grantee's records. If, after resolving any dispute arising from such audit, Grantee has made a license fee underpayment of one and one half percent (1 ½%) or more, the Grantee shall assume all reasonable costs of such audit. In other events, the City shall sustain all costs associated with such audit.
- D. All Grantee's books, maps and records concerning its Gross Revenues and its calculation of payments to the City shall be open for inspection by the appropriate officer of the City, or its designee, at all convenient times to determine the amount of compensation due to the City from Grantee under this License. Such records shall be kept so as to show accurately the same. Grantee shall prepare and make available to the City at times reasonable prescribed by the City and in the form prescribed by the City after consultation with the Grantee, such reports with respect to its Telecommunications Network in Raleigh and the Gross Revenues derived therefrom, as the City may deem reasonable necessary or appropriate. All



other reports required by the Charter and ordinances of the City shall be made by Grantee from time to time as required.

- E. In the event Grantee makes one or more under payments pursuant to Section 3.A. or in the event Grantee fails to make any payment on or before the date it is due, Grantee shall pay interest at a rate of one and one half percent (1.5%) per month on said underpayment(s) and/or said late payment(s).
- F. The Grantee shall file no less frequently than annually any tariffs, amendments, or modifications to licenses directly effecting the sale of Telecommunications Services and operation of the Telecommunication Network and shall notify the City of any changes in any such licenses within thirty (30) days of any such changes. The Grantee shall also provide to the City copies of all filings, reports and petitions to local, state, or federal regulatory agencies.

#### **Section 4. License Not Exclusive**

This License is not exclusive. The City expressly reserves the prerogative to grant rights to other persons or corporations, as well as the right in its own name as a municipality, to use its public ways for similar or different purposes allowed Grantee hereunder.

#### **Section 5. Regulation**

- A. The City Council shall be vested with the power and authority to reasonably regulate the exercise of the privileges permitted by this License in the public interest. Any failure by the City to promptly enforce compliance with this License by federal, state and local laws and ordinances shall not relieve Grantee of its obligation to comply with any provision of this License.
- B. The City reserves the right to inspect the installation and maintenance of the fiber optic cable and related equipment. Grantee shall provide to the City accurate maps of the planned cable installation within thirty days of the completion of installation and construction.
- C. Grantee shall adhere to all federal, state, and local regulations regarding the location, construction, and maintenance of its facilities within the public right-of-way.
- D. Engineering design, construction and as-built documents shall be provided in both hard copy (paper) and electronic (data files) formats. Such maps should designate the location of Grantee's facilities in a mutually

acceptable form. The electronic version must be based upon NC State Plane Coordinates NAD 1983.

- E. Grantee shall file an application for encroachment and secure a Right-of-Way Permit from the Inspections Department prior to installation. Such permit shall not be unreasonably withheld or delayed.
- F. Grantee shall reimburse the City for inspection services by an independent contractor to monitor construction, traffic control, compaction and restoration of the roadway during and thirty (30) days subsequent to the construction period.
  - 1. The cost to Grantee shall not exceed \$560 (e.g., 20 hours times \$28/hour) weekly from the date of project commencement to conclusion. Also, Grantee shall reimburse the City for the full cost of compaction testing which shall not exceed \$200 per 1000' or upon mutual agreement, compaction testing may be performed by an independent body satisfactory to the City and the Grantee at Grantee's expense.
  - 2. The City, at its option, shall either invoice Grantee: a) no more frequently than monthly, or b) at project conclusion.
  - 3. Should Grantee fail to make the payments required by this paragraph, the City, at its option, by written notice may declare this License canceled and terminated and all rights acquired hereunder by Grantee shall thereupon terminate, except Grantee shall be responsible for removing the facilities installed pursuant to this License from the City rights-of-way.
- G. All installation shall be beneath the ground, except where collocated with other aerial utilities and for any temporary, not to exceed thirty (30) days, facilities which may be necessary to provide continued service. Facilities shall be installed underground in streetscape areas designated by the City. Grantee agrees that it shall remove its abandoned facilities in the right-of-way.
- H. The City reserves the right, upon reasonable notice, to require Grantee at its expense to protect, support, temporarily disconnect, relocate or remove from the City's streets any property of Grantee by reason of traffic conditions, public safety, street construction or excavation, change or establishment of street grade, installation of sewers, drains, water pipes, power or communication lines, tracts, or other types of structure or improvements by governmental agencies or any structures of public improvement. Reasonable notice for this provision shall be construed to mean at least ninety (90) days except in the case of emergencies where no

specific notice period shall be required. The City shall endeavor to notify and seek comment from Grantee, with respect to minimizing disruption to the installed facilities where public works projects may affect Grantee's facilities.

- I. Grantee shall place and construct its facilities so as not to interfere with the construction, location and maintenance of sewer or water mains, lines or connections, existing sidewalk, handicap ramps and trees along the ROW. Grantee shall take the necessary preventative measures to protect existing facilities within the public rights-of-way.
- J. Grantee shall locate its underground facilities within the right-of-way by placing concrete surface mount cable markers immediately above its facilities. Sufficient clearance shall be provided to enable lawn-mowing equipment to pass unimpeded and safely overhead. The Grantee shall not place "cable marker posts" within the right of way to designate the location of its underground facilities. Clearance information can be secured from the Department of Parks and Recreation (919) 872-4115.
- K. Grantee shall contract NC One Call Center forty-eight (48) hours prior to excavation and, where possible, shall remain at least ten (10) feet from existing water and sewer mains.
- L. Grantee shall contact the Urban Forestry Inspector at (919) 872-4115 or the City (Urban Forester) at (919) 890-3152 a minimum of forty-eight (48) hours prior to commencing work to obtain guidelines should work to be done be within the crown drip-lines of trees on City rights-of-way or property. Grantee shall bore forty-eight inches (48") beneath trees and no less than ten feet (10') either side of the tree's drip-line and shall be responsible for any damage to trees caused solely by Grantee's construction and/or facilities. The City (Urban Forester) reserves the right to alter Grantee's construction activities on the job site to safeguard trees and shrubs within the right-of-way.
- M. Grantee shall restore and replace landscaped areas, pavement, pedestrian lighting, sidewalks, curbs, gutters or other facilities damaged by Grantee or its contractors with like material to their condition immediately preceding the construction at Grantee's expense, and shall thereafter, from time to time, but no longer than one (1) year from the completion of the job, readjust, fill and finish the same as may be necessary due to settling of the earth associated with Grantee's disruption of the public way. The Department of Parks and Recreation shall approve all grass seed types, seed mixtures and plant material used for landscape restoration, call 872-4115 for seed type authorization.
- N. Where possible, grantee shall not disturb existing public sidewalks located within the right-of-way.

- O. The City, at its sole discretion, may require Grantee to locate and identify its facilities within the public right-of-way.
- P. The Grantee shall comply with the Customer Service Standards (Exhibit B) promulgated by the City for cable-telecommunication service providers as they may be amended from time to time.
- Q. The Grantee shall comply with all federal, state and local regulations, such as the National Electrical Code, National Electrical Safety Code, Fiber Optic Cable Installation Specifications, 1987 (Telecommunication Industry Committee), traffic safety/lane closure rules and construction requirements promulgated by the City and as amended periodically.
- R. Grantee agrees to provide written notice to the City identifying any third party Licensed Provider granted occupancy of its Telecommunications Network facilities to provide Telecommunications Services within the City. Grantee agrees to require such third party to obtain: 1) A Certificate of Public Convenience And Necessity issued by the North Carolina Utility Commission, 2) A Telecommunication License from the City of Raleigh, and 3) An independent lawful authorization to occupy the right-of-way pursuant to City of Raleigh Code 12-1022.

#### **Section 6. Allocation of Telecommunication Resources for Public Purposes**

- A. Subject to availability at the time of the City's request, the Grantee agrees to make available up to five percent (5%) of the installed capacity on the Grantee's Telecommunications Network for civic purposes by City agencies, upon City's request and upon payment of Grantee's actual construction cost for capacity requested by the City; for example, the City may request use or purchase of four (4) fibers within each 96-fiber cable.
- B. It is the intent of the City to secure an Indefeasible Right of Use ("IRU") of bandwidth and/or fiber optic cable ("fibers") from the Grantee. The term shall be coterminous with the term of the License unless otherwise agreed to in writing between Grantor and Grantee.
- C. The Grantee shall provide access to the requested telecommunication facilities within ninety (90) days from written notification. The City or public agency shall reimburse the Grantee for the actual cost for construction and activation.

#### **Section 7. Assignment/Transfer of Control**

- A. This License shall not be sold, mortgaged, assigned or otherwise transferred without the prior consent, which shall not be unreasonably withheld, of the City, as expressed by the City Manager, except to entities that control, are controlled by, or are under common control with the Grantee. Grantee shall notify the City of any pending transfer or hypothecation of assets thirty (30) days prior to such a

transfer. The City's having granted consent in one instance shall not render unnecessary its subsequent consent in any other instance. Nothing contained herein shall be deemed to prohibit mortgage, pledge or assignment of tangible assets of Grantee's Telecommunications Network for the purpose of financing the acquisition of equipment for, or the construction and operation of, Grantee's Telecommunications Network, without the City's consent, but any such mortgage, pledge or assignment shall be subject to the City's other rights contained in this License.

- B. For the purpose of determining whether the City shall consent to any assignment, transfer, merger or mortgage, the City may inquire into the qualifications of the prospective party. The Grantee shall assist the City in any such inquiry. The City may condition any assignment, transfer, merger or mortgage upon such reasonable conditions as it deems appropriate.

## **Section 8. Remedies**

### **A. Forfeiture.**

In addition to any other rights set out elsewhere in this License, and subject to Section 6(B), the City reserves the right to declare a forfeiture of this License, and all of Grantee's rights arising hereunder, in the event that:

1. The Grantee violates any material provision of the Contract; or
2. The Grantee is found by a court of competent jurisdiction to have practiced any fraud or deceit upon the City.

### **B. Notice and Opportunity to Cure.**

The City shall give Grantee thirty (30) days written notice of its intent to exercise its rights under Section 8(A) above, stating the reasons for such action. If Grantee cures the problem within the thirty (30) days notice period, or if the Grantee initiates substantial effort, to remedy the stated problem, and the efforts continue in good faith, the City may, at its option, defer its rights to terminate this License. If Grantee fails to cure the stated violation within the thirty (30) day notice period, or fails to undertake efforts satisfactory to the City, to remedy the stated violation, then the City may, upon reasonable notice, terminate this License in accordance with Section 8(A)

## **Section 9. Confidential Information**

The Grantee may request that the Grantor treat records containing trade secrets or proprietary information as confidential under the North Carolina Public Records law. To the extent authorized by the Public Records law and other applicable state and federal law, Grantor shall maintain the confidentiality of information designated "proprietary" by Grantee. Should Grantor receive a request to review Grantee's records or books under the

North Carolina Public Records law, it will promptly notify Grantee and provide an opportunity for the Grantee to raise an objection, demonstrate why the requested information is proprietary and, if necessary, seek a court order to protect its proprietary information. However, any action taken by the Grantee to protect its records or information shall be done at no cost or liability to the Grantor.

#### **Section 10. Forum for Litigation**

Any litigation relating to this License shall be brought in the Wake County Court having jurisdiction thereof, or if in the federal courts, in the United States District Court for the Eastern District of North Carolina.

#### **Section 11. Notice**

Any notice provided for under this License shall be sufficient if in writing and delivered personally to the following addressee or deposited in the United States Mail, postage prepaid, (Certified Mail, Return Receipt Requested), addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

If to the City:           City Manager  
                                  City of Raleigh  
                                  PO Box 590  
                                  Raleigh, NC 27602

If to the Grantee:       FirstName LastName, Title  
                                  XX XXXXXXXXXXXXXXX, Inc.  
                                  1<sup>st</sup> Address  
                                  2<sup>nd</sup> Address  
                                  City, State ZipCode

Grantee agrees to serve on the City a copy of any filing made at the North Carolina Public Utilities Commission relating to Grantee's Telecommunications Network, although failure to do so shall not constitute a breach of this License.

#### **Section 12. Insurance**

The Grantee, during the life of this License, agrees to procure or cause to be procured from a responsible insurance carrier or carriers, authorized under the laws of the State of North Carolina, insurance shall include, in amounts not less than those indicated herein:

- A.     Worker's Compensation coverage for all employees with Statutory Limits in compliance with applicable state and federal laws. The policy shall include Employers' Liability with a limit of five hundred thousand dollars (\$500,000) for each accident;

- B. Comprehensive General Liability with a minimum limit of one-million dollars (\$1,000,000) per occurrence, two-million (\$2,000,000) aggregate, combined single limit for bodily injury liability and property damage liability. This shall include premises and/or operations, independent contractors, and subcontractors and/or completed operations, broad form property damage, XCU Coverage, and a Contractual Liability Endorsement; and
- C. Business Auto Policy shall have minimum limits of one-million dollars (\$1,000,000) per occurrence combined single limit for bodily injury liability and property damage liability. This shall include owned vehicles, hired and non-owned vehicles.
- D. An umbrella policy which shall have minimum limits of ten million dollars (\$10,000,000) per occurrence.
- E. The City of Raleigh shall be named an additional insured as its interests may appear.
- F. The Grantee shall provide a Certificate of Insurance to the City within thirty (30) days from the execution date of this License.

### **Section 13. Letter of Credit**

- A. Within thirty (30) calendar days following the award of the License, Grantee shall deposit with Grantor a letter of credit from a financial institution, approved by Grantor's Finance Director, in the amount of twenty thousand dollars (\$20,000). The City Attorney shall approve the form and content of the letter. The letter of credit shall be used to insure the faithful performance of Grantee of all provisions of the License, and compliance with all orders, permits and directions of any agency, commission, board, department, division or office of Grantor exercising jurisdiction over Grantee's acts or defaults, and payment by Grantee of any penalties, claims, liens, liquidated damages, or fees due Grantor.
- B. If Grantee fails to pay to Grantor any compensation not in dispute, due Grantor within the time fixed herein; or fails, after ten (10) calendar days notice to pay Grantor any penalties, claims, liens, liquidated damages, fees due Grantor, then such failure by Grantee can be remedied by demand on the letter of credit. Grantor may immediately request payment of the amount due from the letter of credit. Upon such request for payment, Grantor shall notify Grantee of the amount and date thereof.
- C. The letter of credit shall be maintained at twenty thousand dollars (\$20,000) during the entire term of the License. In the event that amounts are withdrawn pursuant to this Section, Grantee, shall take any required action to restore the letter of credit to twenty thousand dollars (\$20,000) within ten (10) calendar days of notification by Grantor of its withdrawal against the letter of credit.
- D. The rights reserved to Grantor with respect to the letter of credit are in addition to all

other rights of Grantor, whether reserved by the Franchise, or authorized by law, and no action, proceeding or exercise of a right with respect to such a letter shall affect any other right Grantor may have.

E. The letter of credit shall contain the following endorsement:

*"It is hereby understood and agreed that this letter of credit shall not be canceled by the surety nor the intention not to renew be stated by the surety until thirty (30) calendar days after receipt by the City, by registered mail, of a written notice of such an intention to cancel or not to renew."*

F. Grantee shall renew the letter of credit not less than thirty (30) calendar days prior to its expiration and provide a copy of the renewal to Grantor.

#### **Section 14. Remedies - Liquidated Damages**



- A. Because Grantee's failure to comply with provisions of this Franchise may result in injury to Grantor, Grantor may impose penalties commensurate to the harm caused to Grantor consistent with the standards set forth herein. Grantor may adjust maximum damage amounts throughout the License term by resolution to take into account increases in the Consumer Price Index.
- B. For failure to comply with material requirements of the regulatory provisions of the License: up to five hundred dollars (\$500.00) each calendar day for each offense. A separate and distinct offense shall be deemed committed each calendar day on which a violation occurs or continues;
- C. For failure, pursuant to this agreement, to submit reports, maintain records, provide documents or information: up to five hundred dollars (\$500.00) for each offense per calendar day. A separate and distinct offense shall be deemed committed each calendar day on which a violation occurs or continues;
- D. For failure to comply with material requirements of the Customer Service Standards; up to five hundred dollars (\$500.00) for each offense per calendar day. A separate and distinct offense shall be deemed committed each calendar day on which a violation occurs or continues;
- E. For failure to comply with assignment provisions (Section 7(A)); up to five hundred dollars (\$500.00) for each calendar day from the date of any unlawful transfer; and
- F. For failure to comply with any material provision herein for which a penalty or sanction is not otherwise specifically provided: up to five hundred dollars (\$500.00) for each offense per calendar day. A separate and distinct offense shall be deemed committed each calendar day on which a violation occurs or continues.
- G. The Grantor shall provide the Grantee with a Notice of Noncompliance and Grantee shall have thirty (30) days in which to cure the deficiency. Penalties shall commence and accumulate only for calendar days of noncompliance, which occur after the final date set by Grantor for achieving compliance. Such date shall be set at a public hearing of which Grantee is given at least three (3) calendar days notice and at which it has an opportunity to be heard. No penalties will be assessed for a violation period, which has existed prior to the expiration of the period set by Grantor herein for correcting the defect.
- H. Consistent with Section 16, Grantor shall stay or waive the imposition of any penalties set forth herein upon a finding that any failure or delay is the result of an act of God or due to circumstances beyond the reasonable control of Grantee.

## **Section 15. Severability**

If any section, subsection, sentence, clause, phrase or portion of this License is declared invalid, unenforceable, or unconstitutional by a court of competent jurisdiction, such portion shall be deemed a separate, distinct, independent, and severable provision, and such holding shall not affect the validity of the remaining portions hereof.

#### **Section 16. Nondiscriminating**

The Grantee shall not to discriminate in any manner on the basis of age, race, sex, handicap, color, creed, or national origin. The Grantee shall comply with the terms and conditions of Ordinance Number 1969-889, as amended.

#### **Section 17. Non divestiture**

This License shall not divest the City of any right or interest in the public rights-of-way.

#### **Section 18. Force Majeure**

In the event Grantee's performance of any of the terms, conditions, obligations or requirements of this Franchise is prevented or impaired due to any cause beyond its reasonable control or not reasonably foreseeable, such inability to perform shall be deemed to be excused and no penalties or sanctions shall be imposed as a result thereof, provided Grantee provides notice to Grantor in writing within thirty (30) calendar days of Grantee's discovery of the occurrence of such an event or within thirty (30) calendar days of Grantor's notice to Grantee of a failure to perform occasioned by such cause, which notice explains the circumstances. Such causes beyond Grantee's reasonable control or not reasonably foreseeable shall include, but shall not be limited to, acts of God, civil emergencies and labor unrest or work stoppages (strikes), untimely delivery of equipment, inability of Grantee to obtain access to property easements, rights of way and inability of Grantee to secure all necessary permits to utilize poles and conduits so long as Grantee utilizes due diligence to obtain said permits in a timely fashion.

#### **Section 19. Acceptance by Grantee.**

This License and all of its terms and provisions shall be accepted by the Grantee in writing in the form hereinafter set forth by the grant of this License by the City Council and when accepted shall be filed with the City Clerk who shall record the same. Such written acceptance may be upon or at the end of a copy of this License and it shall state and express the acceptance of the said License and its terms, conditions, and provisions; and the said Grantee shall agree in said written acceptance to abide by, to observe and to perform the same according to all of its terms and provisions, and shall declare that statements and recitals contained on said License are correct and that it has made and does make the agreements and statements set forth in this License approved by the City Council of the City of

“The undersigned 1<sup>st</sup> Name 2<sup>nd</sup> Name, on behalf of Grantee, does hereby accept and approve the foregoing License and all of its terms and conditions. In consideration of the benefits and privileges granted to it does hereby agree to abide by, carry out, observe, and perform all of the obligations and things provided to be carried out and performed by it in said License approved by the City Council of the City of Raleigh, subject to applicable state and federal law.

seal

My commission expires:

\_\_\_\_\_

**Section 20. Grant**

Approved this the \_\_\_\_\_ day of \_\_\_\_\_ 2000.

IN WITNESS WHEREOF, the undersigned have caused this License to be executed by their properly authorized representatives.

ATTEST

CITY OF RALEIGH

By: \_\_\_\_\_  
Gail G. Smith  
City Clerk

By: \_\_\_\_\_  
D. E. Benton  
City Manager

APPROVED AS TO FORM

By: \_\_\_\_\_  
Tom McCormick  
City Attorney

city-seal

Exhibit A

Certificate of Public Convenience  
And Necessity for **XX XXXXXXXXXXXXXXXX**, Inc.  
issued by the North Carolina Utility Commission

(Attached)

## Exhibit B

### Customer Service Standards

#### 1. Privacy

No less than annually, provide a privacy notice in the form of a separate written statement to customers.

#### 2. Employee Identification

When calling in person on customers or other residents, all employees or authorized representatives of Grantee are required to display an employee identification card with their name, photograph and signature, and a telephone number that can be used for verification of the representative's capacity with Grantee. Grantee's vehicles shall display the name of the Company in easily distinguishable alphanumeric characters. Grantee shall make a reasonable effort to cause its subcontractors' vehicles to be identified in a like fashion.

#### 3. Office and Telephone Availability

- A. Knowledgeable, qualified company representatives will be available to respond to customer telephone inquiries Monday through Friday during normal business hours. Additionally, based on community needs, Grantee will staff its telephones for supplemental hours on weekdays and/or weekends.
- B. Under normal operating conditions, telephone answer time by Grantee's customer service representatives, including wait time required to transfer the call, shall not exceed thirty (30) seconds. This standard shall be met no less than ninety percent (90%) of the time measured on an annual basis.
- C. Under normal operating conditions, the customer shall receive a busy signal less than three percent of the total time that Grantee's office is open for business.
- D. Customer service center and bill payment locations operated by Grantee shall be open for transactions Monday through Friday during normal business hours. Additionally, based on community needs, Grantee shall schedule supplemental hours on weekdays and/or weekends during which these centers shall be open.
- E. Grantee shall be responsible for adopting and implementing customer complaint procedures, and for advising customers of the availability of these procedures. The procedures shall be designed to resolve customer complaints in a timely and satisfactory manner; to develop sensitivity and

responsiveness to customer needs by Grantee and its management; and to improve the quality and dependability of services to customers by Grantee.

Established complaint procedures shall include: specific provisions permitting customer repair service complaints received to be received by telephone twenty-four (24) hours each day and seven (7) calendar days each week; permitting customer repair service complaints to be received at Grantee's business office from 8:00 A.M. until 7:00 P.M. on Monday through Friday of each week and from 9:00 A.M. until 1:00 P.M. on Saturday; and the address of Grantee's business office.

#### 4. Installations, Outage and Service Calls

Under normal operating conditions, each of the following standards shall be met no less than ninety-five percent (95%) of the time measured on an annual basis.

- A. Standard installation shall be performed within seven (7) business days after an order has been placed. "Standard" installations are up to one hundred fifty (150) feet from the existing distribution system.
- B. Excluding those situations beyond the control of Grantee, Grantee shall respond to service interruptions promptly and no later than twenty-four (24) hours after the interruption becomes known to Grantee. Grantee must begin actions to correct other service problems the next business day after notification to Grantee of the service problem.
- C. The "appointment window" alternatives for installations, service calls, and other installation activities shall be 1) morning, 2) afternoon, or 3) all day during normal business hours. Additionally, based on the community needs, Grantee shall schedule supplemental hours during which appointments can be set.
- D. If, at any time an installer or technician is behind schedule, the technician or dispatcher shall attempt to contact the customer and the appointment reschedule as necessary at a time convenient to the customer.
- E. Grantee shall render efficient service, make repairs promptly and interrupt service only for good cause and for the shortest time possible. A notice to customers shall precede such interruptions, insofar as possible.

#### 5. Communication, Statements, Refunds, and Credits

- A. Grantee shall provide written information in each of the following areas at the time of installation and at any future time upon request:

- \* products and services offered
- \* prices and service options
- \* installation and service policies
- \* how to use the telecommunication service

- B. Customer invoice statements shall be clear, concise and understandable. Such statements shall reflect all services and fees in an itemized fashion.
- C. Refund checks shall be issued promptly, but no later than the earlier of thirty (30) calendar days or the customer's next billing cycle following the resolution of the request.
- D. Customers shall be notified in writing a minimum of thirty (30) calendar days in advance of any rate or channel change, provided the change is within the control of Grantee.
- E. Grantee shall provide outage credit to customers in accordance with the following policy:  
  
*Upon notification, should Grantee fail to correct a service outage problem - within its control - within 24 hours after having receipt of such notice, Grantee shall credit 1/30th of the monthly charge for the affected service for each 24-hour period or fraction thereof following the first twenty-four (24) hour period during which the customer experiences service outage. Customer must advise Grantee of the duration of the service interruption for which credit is sought in order to receive such credit. Reasonable notice for this provision shall mean written, telephonic (voice), facsimile or e-mail communication to the Grantee.*
- F. Late fees shall not be assessed earlier than thirty (30) calendar days past the billing cycle due date.

## 6. Complaint - Appeals

- A. Upon notification by a customer of an unresolved complaint, the Information Access Manager shall determine the facts of the complaint by obtaining information from the customer and Grantee and shall act to resolve the complaint in a manner consistent with the City's authority.
- B. The customer may register a complaint with the City, the Public Utility Commission of North Carolina or the Federal Communications Commission.



**EXHIBIT B**  
**Letter of Protest to Jefferson Parish, Louisiana**

**PHELPS DUNBAR** LLP  
COUNSELORS AT LAW

EW

City Plaza - Suite 701  
445 North Boulevard  
P.O. Box 4412  
Baton Rouge, Louisiana 70821-4412  
(225) 346-0285  
Fax (225) 381-9197

Suite 900  
3040 Post Oak Boulevard  
Houston, Texas 77056  
(713) 626-1386  
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December 7, 2000

SkyTel Centre - Suite 500  
200 South Lamar Street  
P.O. Box 23066  
Jackson, Mississippi 39225-3066  
(601) 452-2300  
Fax (601) 360-9777

One Mississippi Plaza - Seventh Floor  
P.O. Box 1220  
Tupelo, Mississippi 38802-1220  
(662) 842-7907  
Fax (662) 842-3873

Lloyd's - Suite 711  
1 Lime Street  
London EC3M 7DQ England  
011-44-207-929-765  
Fax 011-44-207-929-0046

16598-1

Ms. Alicia O'Brien  
Jefferson Parish  
Department of Public Works  
1901 Ames Boulevard  
Marrero, LA 70072

Re: *Metromedia Fiber Network Services, Inc.*  
*Jefferson Parish Construction Permit Application Fee*  
*Permit No. PM-MM-01-00*

Dear Ms. O'Brien:

Metromedia Fiber Network Services, Inc. ("Metromedia") refers you to its check in the amount of \$14,980.00 that paid the construction permit application fee (the "Permit Fee"), as calculated by Jefferson Parish (the "Parish"), for permit No. PM-MM-01-00 (the "Permit"). Metromedia understands that the Parish calculated this Permit Fee at a rate of \$1.50 per linear foot as per Metromedia's engineering plans, which the Parish contends shows that Metromedia's fiber optic cable network system (the "System") spans 10,120 linear feet of "utility or similar installations on Parish rights-of-way and any other property owned or under the control of the Parish. . . ." See *Jefferson Parish's Telecommunications and Utility Franchises and Right-of-Way Occupancy Agreements Ordinance (the "Franchise Ordinance")*, § 35.5-60 (Emphasis added.) As set forth below, because the Parish did not calculate this Permit Fee accurately and because this Permit Fee - conjoined with the Parish's franchise fees - may well conflict with the Federal Telecommunications Act of 1996 (the "Act"), Metromedia paid this Permit Fee under protest, fully reserving its rights.

NO-99136852 1



Letter to Ms. O'Brien  
December 7, 2000  
Page 2

First, Metromedia protests the Permit Fee's amount because the Parish included in it 3,159 feet (at a cost of \$4,738.50) of Metromedia's System that is located on Louisiana Department of Transportation and Development ("L.D.O.T.D."), and not Parish right-of-way. This is contrary to my previous discussions with the Parish. On July 20, 2000, I was told that as per § 35.5-60 of the Franchise Ordinance, the Parish would not charge Metromedia any Permit Fee for that part of its System located on L.D.O.T.D. right-of-way. The plain language of § 35.5-60 makes it clear that the \$1.50 per linear foot fee applies only when Metromedia installs its System "on Parish rights-of-way and any other property owned or under the control of the Parish. . . ." (Emphasis added.) By charging Metromedia the Permit Fee where its System is located on L.D.O.T.D. rights-of-way, the Parish improperly requires Metromedia to pay this Permit Fee.

By letter to the Parish dated August 23, 2000, Metromedia has already informed the Parish that it believes that the \$1.50 per linear foot Permit Fee, coupled with the Parish's franchise fees, conflicts with § 253 of the Act. The Parish's attempt to now extend the \$1.50 fee to property that it does not even own or control is especially troubling.

In sum, Metromedia hopes that the Parish will first reconsider imposition of the Permit Fee altogether, and barring that, that it will at least reconsider the manner in which it calculated the Permit Fee. In this instance, Metromedia has decided to pay the Permit Fee as calculated by the Parish only because it is under a duty to fulfill certain third party contractual obligations to provide telecommunications services that require it to obtain this Permit. We understand that the Parish would not have issued the Permit to Metromedia unless it paid the entire Permit Fee.

Finally, Metromedia wishes to express its disappointment with the delay that it has encountered in the Parish's permitting process. Although the Parish granted Metromedia its franchise approval on September 20, 2000 – almost two months ago – and assured Metromedia that it could parallel track the permitting and franchising processes, Metromedia just received its first permit. Even in Orleans Parish, Metromedia faced no such similar delay. In fact, Metromedia has already installed over 50,000 feet of its System there. In the future, Metromedia hopes that the Parish will – as did Orleans Parish – streamline the permitting process so that similar delays can be avoided.

Yours very truly,



Evans Martin McLeod

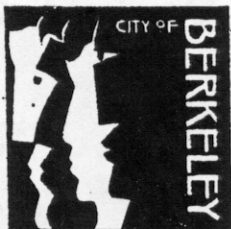
EMM/phs



Letter to Ms. O'Brien  
December 7, 2000  
Page 3

cc: Pat Jackson  
Brian Allen  
Brian Rell  
Traci Bone  
Roy C. Chearwood  
Edward B. Poitevent, II  
Daniel Davillier

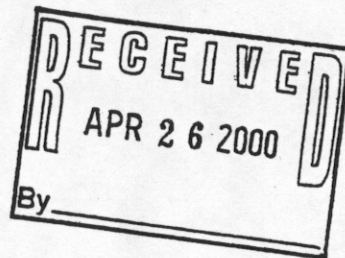
**EXHIBIT C**  
**Letter from Berkley, California**



Department of Public Works  
Engineering Division

April 19, 2000

Metromedia Fiber Network, Inc.  
20936 Cabot Boulevard  
Hayward, CA 94545  
Attn: Laura Boat



Re: Applications for Permit to Excavate

Dear Ms. Boat:

On March 30, 2000, the City of Berkeley received applications for Permits to Excavate from Metromedia Fiber Network, Inc. related to Segment No. 1 of the Marin County Loop. Please be advised that MFN's proposed use of the public right of way requires a franchise agreement from the City pursuant to Article XII of the City Charter. The applications for Permits to Excavate are therefore denied, pending compliance with all applicable legal requirements.

If you have any questions or comments contact Herschel Hollie, Engineering Inspector at 665-3465.

Sincerely yours

Jeffrey Egeberg  
Manager of Engineering

Attachment: Article XII, Charter of the City of Ber

Cc: James Keene, City Manager  
Manuela Albuquerque, City Attorney

**EXHIBIT D**  
**Proposed Berkley, California Ordinance**

ORDINANCE NO. 6608-N.S.

ADDING CHAPTER 16.10 TO THE BERKELEY MUNICIPAL CODE TO REGULATE THE INSTALLATION OF TELECOMMUNICATIONS FACILITIES WHICH UTILIZE STREETS, PUBLIC RIGHTS-OF-WAY, EASEMENTS, OR OTHER PUBLIC PROPERTY;  
REGISTRATION REQUIRED FOR USE OF PRIVATE PROPERTY

BE IT ORDAINED by the Council of the City of Berkeley, California as follows:

**Section 1.** That Chapter 16.10 of the Berkeley Municipal Code is hereby adopted to read as follows:

**Chapter 16.10**

**TELECOMMUNICATIONS CARRIERS**

**Sections**

<b>16.10.010</b>	<b>Purpose</b>
<b>16.10.020</b>	<b>Definitions</b>
<b>16.10.030</b>	<b>Telecommunications Carriers Using Public Property-Registration, Licenses or Franchises, Special Telecommunications Permit and Related Fees Required; Exemptions for Cable Television and OVS Systems and Federal or State Preemption.</b>
<b>16.10.040</b>	<b>Required Registration of Telecommunications Carriers; Process; Required Annual Update; Fees Required</b>
<b>16.10.050</b>	<b>Special Telecommunications Permit-Applicability</b>
<b>16.10.060</b>	<b>Special Telecommunications Permit Application-Contents-Fee</b>
<b>16.10.070</b>	<b>City Determination of Whether Applicant is Subject to Licensing or Franchising-Effect of Failure to File State Exemption Information, Waiver</b>
<b>16.10.080</b>	<b>Applicant Determined Exempt from Licensing or Franchising-City Determination of Application for Special Telecommunications Permit</b>
<b>16.10.090</b>	<b>Telecommunications Carriers Not Exempt from Licensing and Franchising-Application for Special Telecommunications Permit Merged Into License/Franchise Application; Additional Information.</b>
<b>16.10.100</b>	<b>Processing Fees and Compensation Required For License or Franchise</b>
<b>16.10.110</b>	<b>Factors and Process for Approving License or Franchise-Council Approval Required; Term; Non-exclusive Grant; Limited Use Granted</b>
<b>16.10.120</b>	<b>Assignment, Transfer, Lease or Sale of Franchise, License, Telecommunications System, or Telecommunications Facilities</b>
<b>16.10.130</b>	<b>System Construction Schedule/Submittal of Plans</b>
<b>16.10.140</b>	<b>Location of Facilities</b>
<b>16.10.150</b>	<b>Coordination.</b>
<b>16.10.160</b>	<b>Conditions of Use of Streets and Public Rights-of-Ways.</b>



<b>16.10.170</b>	<b>Duty to Remove Telecommunications Facilities from PROW and Public Property.</b>
<b>16.10.180</b>	<b>Construction Standards.</b>
<b>16.10.190</b>	<b>Reservation of Right to Inspect Construction, Documents Related to Construction, and Tests Related to Performance, Technical Integrity and Quality of Signal, Preventive Maintenance and Safety.</b>
<b>16.10.200</b>	<b>Construction Default.</b>
<b>16.10.210</b>	<b>Vacation or Abandonment.</b>
<b>16.10.220</b>	<b>Abandonment in Place.</b>
<b>16.10.230</b>	<b>Facility Agreements</b>
<b>16.10.240</b>	<b>System Technical Data.</b>
<b>16.10.250</b>	<b>Availability of Technical Data.</b>
<b>16.10.260</b>	<b>Retention and Submission of Reports and Records.</b>
<b>16.10.270</b>	<b>Inspection and Review of Books, Records and Other Data.</b>
<b>16.10.280</b>	<b>Indemnity.</b>
<b>16.10.290</b>	<b>Liability Insurance.</b>
<b>16.10.300</b>	<b>Financial Security.</b>
<b>16.10.320</b>	<b>Telecommunications Carriers Seeking Relief from This Ordinance</b>
<b>16.10.340</b>	<b>Telecommunications Carriers or Its Assignees Subject to Present and Future Ordinances and/or Resolutions.</b>
<b>16.10.350</b>	<b>Resolution of Conflicts Between this Ordinance and a Subsequent Franchise Agreement or License</b>
<b>16.10.360</b>	<b>Force Majeure</b>
<b>16.10.370</b>	<b>Notices.</b>
<b>16.10.380</b>	<b>Severability.</b>
<b>16.10.390</b>	<b>Administration--Declaration of Powers and Authority.</b>
<b>16.10.400</b>	<b>Revocation and Termination</b>
<b>16.10.410</b>	<b>Possessory Interest.</b>
<b>16.10.420</b>	<b>Violations.</b>

#### **16.10.010 Purpose**

The purpose of this ordinance is to more specifically regulate Telecommunications carriers providing telecommunications services using public rights of ways and other public property because other applicable laws provide an insufficient basis to address the frequency, nature and scope of the excavations and encroachments necessitated by telecommunications carriers. The regulations enacted by this ordinance are intended to minimize disruption of vehicular and pedestrian traffic, foster an aesthetically pleasing urban environment and prevent visual blight, compensate the City of Berkeley for the use of its property; reimburse the City for its costs of regulating the installation and maintenance of telecommunications facilities, systems and equipment on public property and public rights of way and determine competing uses of such property. This ordinance is also requires the registration of Telecommunications equipment, and systems installed on private property in order to facilitate joint trenching wherever possible and to minimize disruption of public property and public rights of way. The codification of these requirements in a consistent and comprehensive manner is also intended to create a more predictable regulatory environment and thereby encourage the expansion of telecommunications services and the entrance of all carriers on a competitively equal basis. Nothing herein shall modify or amend any existing legally binding franchise, license, or agreement.

#### **16.10.020 Definitions.**

The following terms apply for purposes of this chapter.

"Affiliated Person" or "Affiliates," means each Person who falls into one or more of the following categories: (i) each Person having, directly or indirectly, a Controlling Interest in a Telecommunications Carrier; (ii) each Person in which a Telecommunications Carrier has, directly or indirectly, a Controlling

Interest; (iii) each officer, director, general partner, limited partner holding an interest of five percent (5%) or more, joint venturer, or joint venture partner in a Telecommunications System in the City; and (iv) each Person, directly or indirectly, controlling, controlled by, or under common Control with a Telecommunications Carrier; provided that "Affiliated Person" excludes the City, any limited partner holding an interest of less than five percent (5%) in a Telecommunications Carrier, or any creditor of a Telecommunications Carrier, solely by virtue of its status as a creditor, and which is not otherwise an Affiliated Person by reason of owning a Controlling Interest in, being owned by, or being under common ownership, common management, or common Control with a Telecommunications Carrier. "Assignment" or "Transfer" means any assignment, transfer, sale or other transaction of a franchised or licensed Telecommunications System, or any part thereof, or its corporate or partnership parent, which has the effect of changing the operational, managerial, or financial Control of the Telecommunications System or the Telecommunications Carrier.

"Cables" means any wires, copper, coax, or fiber or conduit used to house the same, utilized for Telecommunications purposes.

"Cable operator" means any Person or group of Persons who:

1. Provides Cable Service over a Cable System and directly or through one or more Affiliates owns a Controlling Interest in such Cable System; or
2. Otherwise controls or is responsible for, through any arrangement, the management and operation of such a Cable System.

"Cable System" or "Cable Television System" means a facility consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide Cable Service as defined in the Cable Act and which is provided to multiple subscribers within the City. However, such terms do not include the following:

1. A facility that serves only to retransmit the television signals of one or more broadcast stations; or
2. A facility that serves subscribers without using any public right-of-way; or
3. A facility of a common carrier which is subject, in whole, or in part, to the provisions of Title II of the Communications Act of 1934, except that such facility shall be considered a Cable System (other than for purposes of Section 621(c) of the Cable Act, codified at 47 USC 541) to the extent such facility is used in the transmission of video, voice, or data programming or services directly to subscribers; or
4. Any facilities of any electric utility used solely for operating its electric utility.

"City" means the City of Berkeley, California.

"City Council" means the City Council of the City.

"Consultant" means the entity hired by the Telecommunications Carrier under the supervision of the City to inspect construction or to locate utilities.

"Control" or "Controlling Interest" means actual working control in whatever manner exercised, including, without limitation, working control through ownership, management, debt instruments, or negative control, as the case may be, of the Telecommunications System, or the Telecommunications Carrier. A rebuttable presumption of the existence of Control or a Controlling Interest shall arise from the beneficial ownership, directly or indirectly, by any Person or group of Persons acting in concert (other than underwriters during the period in which they are offering securities to the public) of twenty percent (20%) or more of any Person (which

Person or group of Persons is referred to as "Controlling Person"), or being a party to a management contract.

"Easement" means and shall include any public easement or other compatible use created by dedication, or by other means, to the City for public utility purposes or any other purpose whatsoever.

"Excess Capacity" means the volume or capacity in any existing or future duct, conduit, manhole, handhole or other utility facility within the public way that is or will be available for use for third party Telecommunications Facilities.

"Fiber Cable" or "Fiber Optic Cable" means very thin and pliable cylinders, or strands of glass or plastic, or any future functional equivalent, used or capable of being used to carry signals transmitted by means of modulated light.

"Nodes" shall mean the cabinet and equipment, including power supply, fans, gas generators, batteries and optical to electrical converters, located in the neighborhoods, which serve homes, businesses, and institutions, and which is the point where fiber facilities, cable facilities and/or other wire cables are connected.

"Other Ways" means the highways, streets, alleys, utility easements or other rights-of-way within the City, but under the jurisdiction or control of a governmental entity other than the City.

"Overhead Facilities" means utility poles, utility facilities and telecommunications facilities located above the surface of the ground, including the underground supports and foundations for such facilities.

"Open Video System" or "OVS" shall have that meaning given in the Telecommunications Act of 1996.

"Pedestal" shall mean an above-ground enclosure which houses active and/or passive equipment relating to the Telecommunications System.

"Person" means any individual, corporation, estate, trust, partnership, association of two or more Persons having a joint common interest, or joint stock company.

"Power Supply" shall mean an electronic or gas driven device designed to provide electrical power to all or a portion of the Telecommunications System.

"PROW" means Streets, Public Rights-of-Way, and Easements.

"Public Property" means and includes all real property owned, operated or controlled by the City, other than PROW and any privately-owned area within City's jurisdiction which is not yet, but is designated as a proposed public place on a tentative subdivision map approved by City,

"Public Right-of-Way" means any public street, public way, public place or rights-of-way, now laid out or dedicated, and the space on, above or below it, and all extensions thereof, and additions thereto, owned, operated and/or controlled by the City or subject to an easement owned by City and any privately-owned area within City's jurisdiction which is not yet, but is designated as a proposed public place on a tentative subdivision map approved by City.

"Pull Box" shall mean a flush mounted or above-ground housing which encloses one or more conduit openings.

"PUC" means the California Public Utilities Commission.

"Revocation," "Termination" or "Nonrenewal" means an official act by the City that removes, repeals or rescinds previously approved authorization for a licensed or franchised Telecommunications Carrier to operate a Telecommunication System within the City.

"Street" means the surface of, and the space above and below a public street (or any path or thoroughfare designated for vehicular and/or pedestrian traffic), or other easement now or hereafter held by the City (including any street, as defined, which is acquired by eminent domain) for the purpose of public travel.

"Subscriber" means a Person lawfully receiving or using a Telecommunications Service delivered by a Telecommunications Carrier over a Telecommunications System.

"Surplus Space" or "Surplus Capacity" means that portion of the usable space on a utility pole or other Telecommunications Facilities which has the necessary clearance from other users, as required by the orders and regulations of the California Public Utilities Commission (PUC) to allow its use by a Telecommunications Carrier.

"Tap" means an electronic or photonic pathway, by way of wire, coaxial, fiber, or otherwise between that portion of the Telecommunications System located in the public rights-of-way and the subscriber's residential, commercial, or industrial structure.

"Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the content of the information as sent and received.

"Telecommunications Carrier" or "Telecommunications Operator" means (i) any Person who owns or controls, by way of fee ownership, lease, management agreement, any Telecommunications System or Telecommunications Facilities, or (ii) the direct or indirect provider of Telecommunication Services whether the Telecommunication Service is offered by the owner of the Telecommunications System, an affiliate, or a related entity, by way of ownership, lease, control, or operation of a Telecommunications System. A Person shall be deemed a Telecommunications Carrier, even if it does not directly provide Telecommunications Services, if it rents or leases a Telecommunications System and/or Telecommunications Facilities to another Person which provides Telecommunications Services.

"Telecommunications Equipment" means equipment, other than customer premises equipment, used by a Telecommunications Carrier to provide Telecommunications Services, and includes software integral to such equipment (including upgrades) which are not located, in whole or in part, in, above, or below Streets, Public Rights-of-Way or other Public Property.

"Telecommunications Facilities" shall mean any facility located, in whole or in part, in, above, or below PROW or Public Property used by the Telecommunications Carrier in its Telecommunications System including without limitation, conduits, cables, cabinets, Nodes, structures, headend equipment, power supplies, receive only earthstations, down link equipment and antennas, electronics, fiber cable, coaxial cable, drops and switching equipment whether part of a stand-alone system or in conjunction with or as part of a Cable System.

"Telecommunications Service" means the offering of Telecommunications for a fee directly or indirectly to any Person.

"Telecommunications System" means an operating system which is located, in whole or in part, on, in, above, or below PROW or other Public Property which is designed and utilized, in whole or in part, to provide Telecommunications Services. A Telecommunications System may be built in conjunction with, or be part of, a Cable System.

"Telephone Company" means every Person within the scope of Public Utilities Code Section 7901 who has constructed or may construct telegraph or telephone lines pursuant to a Certificate of Public Convenience and Necessity issued by the PUC.

"Underground Facilities" means utility and Telecommunications Facilities located under the surface of the ground, excluding the underground foundations or supports for overhead facilities.

"Usable Space" means the total distance between the top of a utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance as specified in the orders and regulations of the PUC.

"Utility Easement" means any easement owned by the City or acquired, established, dedicated or devoted for public utility purposes.

"Utility Facilities" means the plant, equipment and property, including but not limited to the poles, pipes, mains, conduits, ducts, cables, wires, plant and equipment located under, on or above the surface of the ground within the public ways and used or to be used for the purpose of providing utility or Telecommunications Services.

**16.10.030 Telecommunications Carriers Using Public Property-Registration, Licenses and Franchises and Special Telecommunications Permit Required-**

**Exemptions.**

A. Applicable Requirements. All Telecommunication Carriers other than Cable and OVS operators governed by subdivision B, seeking to utilize or utilizing Public Property or PROW to provide telecommunications service on or after the effective date of this ordinance shall be subject to the requirements set forth in this chapter and generally described in this section. Use of private property for the installation of a telecommunications system shall be subject to the registration requirements of this chapter in addition to any federal, state and local laws including zoning and building permit requirements to which such installation is otherwise subject .

1. Registration with the City and payment of related registration fees, in accordance with section 16.10.040, in order to facilitate Telecommunications carriers' compliance with the regulations imposed by this chapter and related local, state and federal requirements.

2. The execution of a written license with the City and the payment of related compensation for use of the right of way or public property pursuant to Section 16.10.080, where the carrier does not intend to provide services within the geographical limits of the City of Berkeley, unless the City determines either that the carrier is exempt under state or federal law from the payment of a license fee pursuant to Section 16.10.070

3. The execution of a written franchise subject to this chapter and Chapter 9.60 and the payment of related compensation, where the Telecommunications Carrier intends to provide telecommunications services within the geographical limits of the City, unless the City determines either that the carrier is exempt under state or federal law from the payment of a franchise fee pursuant to Section 16.10.070.

4. A Special Telecommunications Permit and related fees pursuant to Section 16.10.050 et. sequitur.

5. The additional requirements imposed by this chapter on the installation, maintenance, operation, removal and upgrade of the Telecommunications Equipment, facilities, system and related record-keeping, reporting, insurance, indemnity, financial, and other regulatory requirements of this chapter.

6. Any other permits and fees and requirements otherwise imposed by federal state or local law, including excavation or encroachments permits under Title 16 of the Berkeley Municipal Code and any franchises and licenses.

B. Exemption for Cable Television Systems and OVS Systems Franchised Subject to Chapter 9.56. Cable Operators using Public Property or PROW solely to operate a Cable Television system shall not be subject to this ordinance but shall comply with Chapter 9.56 and any other applicable provision of local, state or federal law. Nothing in this section shall exempt a cable operator who operates telecommunications services other than a Cable Television system from the provisions of this chapter with respect to such other services.

**16.10.040 Required Registration of Telecommunications Carriers; Process; Required Annual Update; Fees Required.**

A. Duty To Register and Update Registration Forms Annually. Upon the effective date of this ordinance all Telecommunications Carriers currently engaged in using public property or public rights of way or private property shall complete registration forms provided by the City and pay related fees. Such carriers shall update the forms on such forms on January 1 of each succeeding year and pay the fees imposed in connection therewith.

B. Registrations Forms and Information Required. The registrant shall disclose and provide the following information:

1. The identity and legal status of the registrant, including any affiliates.
2. The name, address and telephone number of the officer, agent or employee responsible for the accuracy of the registration statement.
3. A map, in electronic and/or other form required by the City, of the location of and a description of registrant's existing or proposed Telecommunications Facilities within the City in the form and detail required by the City. Such information shall include whether and to what extent said carrier has existing excess capacity and shall remain confidential to the extent permitted by applicable law.
4. A description of the Telecommunications Service that the registrant intends to offer or provide, or is currently offering or providing to persons, firms, businesses or institutions within the City, as well as a specific time table or schedule for the provision of each Telecommunications Service.
5. Information satisfactory to the City to enable it to determine whether the registrant is subject to franchising or licensing under this Ordinance.
6. Information satisfactory to the City to enable it to determine that the registrant has applied for and received any certificate of authority required by the PUC to provide Telecommunications Services or Telecommunications Facilities within the City. The Telecommunications Carrier shall state which of the Telecommunications Services, if any, offered or to be offered within the City are not covered or authorized by said PUC certificate of authority.
7. Information satisfactory to the City to enable it to determine that the registrant has applied for and received all construction permits, operating licenses or other approvals required by the FCC to provide telecommunications Services or Telecommunications Facilities within the City.
8. The identity and address of every Person that has entered into any agreement which authorizes, directly, or indirectly, such Person to utilize a dedicated and discrete portion, by way of sale, lease, indefeasible right of use, or otherwise, Telecommunications Facilities or all or a portion of the Telecommunications System (The "Telecommunications Agreement") within the City other than a residential user, or another Telephone Corporation which possesses a Certificate of Public Convenience and Necessity from the PUC.
9. A Three-year Business Plan and Three Year Construction Plan for proposed activities within the City. Said information shall remain confidential to the extent permitted by applicable law.
10. Photographs or artist drawings of all above-ground facilities and their precise proposed locations and dimensions.
11. Such other information relating to PROW use as the City may reasonably require.

**16.10.050 Special Telecommunications Permit-Applicability; Application Subject to Prior Notice and Dialogue With the Public Regarding Above-Ground facilities and with Other Telecommunications Carriers regarding Excess Conduit and Joint Installation.**

A. Upon adoption of this chapter, in addition to registration pursuant to section 16.10.040, required annual registration information updates and any other permit or entitlement required by local state or federal law, including any license or franchise which may be required pursuant to this chapter, all Telecommunications Carriers, other than Cable and OVS Operators exempt pursuant to section 16.10.030 B, shall obtain a Special Telecommunications Permit pursuant to section 16.10.050 prior to installing any Telecommunications Facilities on Public Property or PROW and shall pay all fees imposed in connection therewith. Such permit is in addition to any

other excavation, encroachment or other permit required by Title 16 of the Berkeley Municipal Code or any other provision of law and shall be required both where such facilities are being installed overhead, aerial in existing conduit owned by other Telecommunications carriers or in new conduit necessitating an excavation of public property or PROW is installed.

B. Telecommunications Carriers shall provide advance notice to the public of the proposed quantity, precise dimensions, design, color, type and location of Pedestals and other above-ground telecommunications facilities and information about noise generated by such facilities and alternatives for reducing the aesthetic impacts of the facilities, including but not limited to size reductions, screening and alternative locations and undergrounding. Such notice is required to include photographs or artists renderings, of all above-ground Pedestals and other visible equipment, from which their size must be apparent. It must also include, a detailed description of the equipment included within the facility including: the electronic components, natural gas generator, electrical fans, and the anticipated noise levels during winter and summer months and the emergency backup operations and equipment. The proposed maintenance schedule for such above-ground facilities shall be included. Telecommunications Carrier will provide its non-toll telephone number answered twenty-four (24) hours a day and a telephone number of the City which may be called if the property owner is concerned about the installation. Carrier must respond to any inquiry within 48 hours and shall promptly report to the City what the response has been. The Carrier shall attempt take all reasonable steps to modify its proposed plans to accommodate public concerns prior to filing an application with the City regarding the installation of such facilities.

C Telecommunications Carrier shall first seek to use excess conduit of other carriers prior to seeking construction on or in public property or PROW. It shall also provide reasonable advance notice to other carriers and provide them an opportunity to jointly install telecommunications facilities in the property which is proposed to be the host of the carrier's telecommunications facilities pursuant to the Special Telecommunications permit.

D. The granting of a Special Telecommunications Permit shall be considered a project as defined by Public Resources Code Section 21065 and shall be subject to review under the California Environmental Quality Act (CEQA) as required by Public Resources Code 21000 et. seq., the CEQA Guidelines (Title 14. California Code of Regulations), and the City's Environmental Review Procedures as they may be amended from time to time.

#### **16.10.060 Special Telecommunications, Permit Application-Contents - Fee.**

An Application for a Special Telecommunications Permit, along with payment of any fees required therefor, shall be filed with the City, in the form and manner required by the City and shall contain all the following:

- 1 The identity of the Applicant, including all affiliates of the Applicant.
2. A description of the Telecommunications Services that are or will be offered or provided by licensee over its Telecommunications System including whether such services are to be provided within the geographical limits of the City.
3. A description of the transmission medium that will be used by the licensee to offer or provide such Telecommunications Services.
4. Preliminary engineering plans, specifications and a network map of the facilities to be located within the City, including a map in electronic and/or other form required by the City constituting an update of any such map which may previously have been provided by the Applicant to the City in connection with registration pursuant to section 16.10.040. Such plans, specifications and map shall be in sufficient detail to identify:

a. the location and route requested for Applicant's proposed Telecommunications Facilities and where excavation of Public property or PROW is being proposed, Applicant shall demonstrate that : i ) reasonable advance notice and opportunity to participate was afforded to other Telecommunications Carriers to jointly install their Telecommunications Equipment and Facilities in the Public Property and PROW which is to be the host of the applicant's equipment and facilities pursuant to the permit for which the application is filed; and ii ) the Applicant sought but was unable to obtain the excess conduit of other Telecommunications' Carriers along the proposed route for Applicant's proposed communications facilities.

b. the location of all overhead and underground Telecommunication, Facilities in the Streets and Public Right-of-Ways along proposed route including the proposed quantity, precise dimensions, color, type and location of existing and proposed Pedestals and other above-ground telecommunications facilities and equipment, along with photographs or artists renderings, of all above-ground Pedestals and other visible equipment, from which their size must be apparent. It must also include, a detailed description of the equipment included within the node including: the electronic components, natural gas generator, electrical fans, and the anticipated noise levels during winter and summer months and the emergency backup operations and the proposed maintenance schedule for such above-ground facilities. For such above-ground facilities, proof shall be made to the satisfaction of the City that the public notice requirements of section 16.10.050 have been fulfilled.

c. the locations, if any, for interconnection with the Telecommunications System of other Telecommunications Carriers.

d. the specific trees, structures, improvements, facilities and obstructions, if any that Applicant proposes to temporarily or permanently remove or relocate.

5. If the Applicant is proposing to install Overhead Facilities, evidence that Surplus Space is available for locating its Telecommunications System on existing utility poles along the proposed route and that the affected utility has consented to the installation.

6. If Applicant is proposing an Underground Installation in existing ducts or conduits within the PROW, information in sufficient detail to identify:

a. The Excess Capacity currently available in such ducts or conduits before installation of Applicant's Telecommunications Facilities;

b. The Excess Capacity, if any, that will exist in such ducts or conduits after installation of Applicant's Telecommunications Facilities.

7. If applicant is proposing an Underground Installation within new ducts or conduits to be constructed within the PROW:

a. the location proposed for the new ducts or conduits;

b. The Excess Capacity that will exist in such ducts or conduits after installation of Applicant's Telecommunications Facilities.

8. A preliminary construction schedule and completion date.



9. A preliminary traffic control plan in accordance the Work Area Traffic Control Handbook, latest edition.

10. Information in sufficient detail to establish that the Applicant's technical qualifications, experience and expertise regarding the Telecommunications System and Telecommunications Facilities described in the Application.

11. Information to establish that the Applicant has obtained all other governmental approvals and permits to construct and operate the Telecommunications Facilities and to offer or provide the Telecommunications Services and a certification that the Applicant will comply with all applicable local state and federal requirements in the installation, operation, maintenance., removal of its Telecommunications System, and Facilities.

12. If the Applicant asserts that all or part of the activities for which the permit is sought are exempt from either licensing or franchising and related fees and compensation pursuant to state or federal law, a Petition for Exemption shall accompany such application, setting forth with specificity, the legal and factual reasons, which shall be supported by written documentation , as to why any or all the activities which are the subject of the permit application are exempt from licensing or franchising. Failure to comply with the documentation required to claim exemption pursuant to this section shall entitle the City to treat the subject of the permit application as subject to either licensing or franchising pursuant to this chapter.

13. Any and all convictions or findings by any governmental authority that the applicant has violated any law or ordinance (including environmental laws or ordinances) license agreement, or franchise agreement relating to, in any way, the use of PROW in any community.

14. Such other and further information as may reasonably be required by the City Manager.

**16.10.070 City Determination of Whether Applicant is Subject to Licensing and Franchising-Effect of Failure to File State Exemption Information-Waiver**

If the Applicant claims that all or part of the telecommunications facilities, equipment or system to be installed on Public Property or PROW is exempt from City licensing or franchising, on the grounds that such licensing or franchising is contrary to state or federal law, the City shall determine whether an Applicant for a Special Telecommunications permit is subject to either a license or franchise imposed by this chapter for all or part of its telecommunications facilities, equipment or system. If the City determines that a license or franchise is required, the license or franchise shall be obtained as set forth in this chapter. Failure to submit a Petition for Exemption, together with all information and fees required by the City in connection therewith as required by this chapter shall be deemed a waiver of any such claim of exemption. If the City determines the application is exempt in whole or in part, such exemption shall only apply to the particular matters in such application found to be preemptive of City licensing or franchise requirements and only to the extent the City has determined.

**16.10.080 Applicant Determined Exempt from Licensing or Franchising -City Determination of Application for Special Telecommunications Permit -Prior Notice to Affected members of the Public As to Above-Ground Facilities**

A. Determination of Special Telecommunications Permit. Where the City has concluded that an Applicant is exempt from the licensing and franchising provisions of this chapter as provided in section 16.10.060, the City shall determine whether to issue the Special Telecommunications Permit.

B. Prior to making its determination, City shall provide reasonable advance notice to affected members of the public of the proposed quantity, precise dimensions, design, color, type and location of Pedestals and other above-ground telecommunications facilities. Such notice shall include information about noise generated by such facilities and alternatives for reducing the aesthetic impacts of such facilities, including but not limited to size reductions, landscaping, screening and alternative locations and undergrounding. Such notice shall also include photographs or artists renderings, of all above-ground Pedestals and other visible equipment, from which their size must be apparent. It must also include, a detailed description of the equipment included within the node including: the electronic components, natural gas generator, electrical fans, and the anticipated noise levels during winter and

summer months and the emergency backup operations and equipment. The proposed maintenance schedule for such above-ground facilities shall be included. The Notice shall specify the name, title and telephone number of the individual in the City to whom comments may be made and when such comments are due.

C. The determination to grant or deny a Special Telecommunications permit and to grant or deny a license or franchise pursuant to Section 16.10.090- 16.10.110 shall be based upon the criteria set forth in this section provided however that the grant or denial of a license or franchise shall be subject to the additional criteria and requirements imposed by the sections of this chapter and of this code regulating such license or franchise. The City shall consider the following:

1. The legal and technical ability of the Applicant.
2. The capacity of the PROW to accommodate the Applicant's proposed Telecommunications Facilities.
3. The capacity of the PROW to accommodate additional utility and Telecommunications Facilities if the permit is granted.
4. The damage or disruption, if any, to public or private facilities, improvements, aesthetics, services, travel or landscaping if the permit is granted.
5. The public interest in minimizing the cost and disruption of construction within the PROW.
6. The availability of alternate routes and/or locations for the proposed Telecommunications Facilities.
7. The aesthetic and blighting effect of any above-ground facilities by virtue of their design, dimensions, locations and quantity.

8. Any and all convictions or findings by any governmental authority that the applicant has violated any law or ordinance (including environmental laws or ordinances) or license agreement or franchise agreement relating to, in any way, use of PROW which would reflect on the Applicant's ability to comply with the terms of this chapter or other applicable local law including the applicant's failure to comply with this chapter as to any prior application or currently operating facility. The City may decline to further process an application for a new permit or entitlement pending the applicant's compliance with this chapter or other applicable provision of local law as to its telecommunications facilities

D Modifications Any approval of a permit may require modifications to the proposed activities pursuant thereto as a result of the City's consideration of the factors set forth above, including by limiting or changing the number, size and location of the above ground facilities and equipment proposed to be installed and/or requiring the installation of landscape or other camouflaging techniques or requiring undergrounding to minimize **adverse visual impacts and obstructions.**

E Conditions Imposed Including Compliance With Standards in Chapter. City may impose any reasonable conditions on the permit, including the timing, method of construction, and location of the facilities proposed to be installed pursuant to such permit and any public notice which may be required. Any permit granted shall be conditioned upon the Applicant's compliance with standards regarding the installation, maintenance, operation, removal, and upgrade of the Telecommunications Equipment, facilities, system and related noticing, record-keeping, reporting insurance, indemnity, financial, and other regulatory requirements of this chapter.

**16.10.090 Telecommunications Carriers Not Exempt from Licensing and Franchising-Application for Special Telecommunications Permit Merged Into License/Franchise Application; Additional Information.**

A. Non-exempt carriers; merger of Special Telecommunications Permit application into license/franchise application. Where the City has determined, pursuant to Section 16.10.070, that all or part of a Telecommunications Carrier's activities to install telecommunications equipment or facilities on Public Property and PROW are subject to the procurement of a City license or franchise, or the Carrier has not petitioned for an exemption from such requirements, as provided in this chapter, the application for a Special Telecommunications Permit shall be merged into an application for a license, if no services are being provided within the geographical limits of the City, or into an application for a franchise, if telecommunications services are being provided within the geographical limits of the City.

B. Additional Information Required. In addition to the information supplied in connection with application for a Special Telecommunications Permit, the City may require any additional information which it deems necessary in order to determine whether a license or franchise shall be granted. In the case of an application for a franchise, such information shall include all of the following:

1. Whether the Applicant intends to provide cable service, video dial tone service or other video programming service, and sufficient information to determine whether such service is subject to cable franchising.

2. An accurate map in the electronic and/or other form required by the City showing the location of any existing Telecommunications System(s) in the City that Applicant intends to use or lease.

3. A description of the Telecommunications Services or Telecommunications Facilities, if any, that the Applicant will offer or make available to the City and other public, educational and governmental institutions.

4. A description of Applicant's access and line extension policies.

5. The area or areas of the City the Applicant desires to serve and if applicable, a schedule for build-out to the entire franchise area.

#### **16.10.100 Processing Fees and Compensation Required For License or Franchise.**

Each and every Licensee or Franchisee shall pay a processing fee as determined by the City Council to reimburse the City for its costs in processing the application for a license or franchise. In addition, the applicant shall pay a License/Franchise Fee for the use of the property rights granted to the Licensee/Franchisee, namely, the privilege of using PROW or Public Property to construct, maintain, and operate a Telecommunications System or any portion thereof, as a condition and requirement of each and every License/Franchise. Such fee shall consist of the following components:

A. Minimum Compensation Component. Each and every Licensee/Franchisee which constructs, maintains, and operates a Telecommunications System, or any portion thereof, or provides a Telecommunications Service, which the City has not determined not to be exempt pursuant to Section 16.10.070, shall pay minimum compensation (the "Minimum Compensation Requirement") determined by the City Council on an annual basis by resolution or in an amount to be established in the License or

Franchise. The Minimum Compensation Requirement shall not exceed the fair market value of the property rights granted to the Franchisee, i.e., the privilege of using PROW or Public Property, and Easements to construct, maintain, and operate a Telecommunications System or portion thereof, which are not exempt in their entirety from the imposition of a compensation requirement by applicable federal or state law. The City may accept in-kind compensation for all or a portion of the Minimum Compensation Requirement of approximately equal value.

B. Additional Compensation. Either at the time of issuance of any License, Franchise, Permit, or other authorization, or any time thereafter, the City may determine whether or not the Minimum Compensation Requirement equates to or is less than the fair market value of the property rights granted to the Licensee, namely, the privilege of utilizing PROW or Public Property to construct,

maintain, and operate a Telecommunications System or portion thereof. If the City determines that said non-exempt property rights possess a fair market value in excess of the Minimum Compensation Requirement, the City may require the Licensee or Franchisee to provide additional compensation to the City, in cash or in-kind services or facilities, which represents in value the difference between the Minimum Compensation Requirement and the fair market value (the "Additional Compensation") (the Minimum Compensation Requirement and the Additional Compensation shall collectively be referred to as the "Total Compensation"). Under no circumstances shall the Total Compensation exceed the fair market value of the non-exempt property rights granted to the Licensee, Franchisee, or holder of the permit or authorization. The City Council may, from time to time, but no more frequently than annually, establish by resolution the Additional Compensation and modify said Additional Compensation based upon increases in the fair market value of the non-exempt property rights granted or conveyed unless the City Council has entered into a written agreement to establish a different compensation for such period.

C. Acceptance of License/Franchise Constitutes Acceptance of License/Franchise Fee Imposed. Execution of the written license or franchise agreement shall constitute an acceptance of the Minimum Compensation and Additional Compensation requirements of this chapter.

**16.10.110 Factors and Process for Approving License or Franchise-Council Approval Required; Term; Non-exclusive Grant; Limited Use Granted.**

The City Manager shall determine whether to recommend that the City Council grant a license or franchise as set forth herein.

A. Additional Factors to be Considered In addition to the factors set forth in Section 16.10.080, the City Manager shall consider the following additional factors in making his recommendations to the City Council as to whether and on what terms to grant a license or franchise :

1. The service that Applicant will provide to the community and region.
2. The effect, if any, on public health, safety and welfare if the Franchise requested is granted.
3. Such other factors-as may demonstrate that the grant to use the PROW will serve the community interest.

B. Procedure The procedure for Council consideration of such license or franchise shall be as set forth in Chapter 9.60.

C. Term The term for which each license or grant is made shall be specified in the license or franchise agreement but in no event shall be greater than any maximum term set by law.

D. Nonexclusive Grant: No License or Franchise granted under this section shall confer any exclusive right, privilege, license or franchise to occupy or use the PROW for delivery of Telecommunications Services or any other purposes.

E. Limited Use Granted: No License or Franchise granted under this Section shall convey any right, title or interest in the PROW, but shall be deemed a Franchise only to use and occupy the PROW for the limited purpose and term stated in the grant. Further, no Franchise shall be construed as any warranty of title.

F. License/Franchise Agreement Subject to terms For Special Telecommunications permit pursuant to 16.10.080: The license or franchise granted pursuant to this chapter shall be conditioned upon compliance by the Licensee or Franchisee with standards regarding the installation, maintenance, operation, removal and upgrade of the Telecommunications Facilities, System and related record-keeping, insurance, indemnity, financial, and other regulatory requirements of this chapter.

**16.10.120 Assignment, Transfer, Lease or Sale of Franchise, License, Telecommunications System, or Telecommunications Facilities.**

A. There shall be no assignment of a Franchise or License, in whole or in part, or any Change in Control of the franchised or licensed Telecommunications Carrier, without the prior express written approval of the City.

B. Any assignment or transfer, or any change in Control, without the City's prior written consent shall constitute a default which will cause a Franchise or License to terminate.

C. At least one hundred twenty (120) days before a proposed assignment or change in Control of the Franchise or License is scheduled to become effective, the Telecommunications Carrier shall request in writing the City's consent. The Telecommunications Carrier shall submit to the City (concurrently with the submission of its written request) (i) any other information or documentation required by the State or federal government; (ii) the information referenced in this Ordinance; (iii) unedited and unredacted copies of the sale or transfer documents with all schedules and exhibits thereto; and (iv) information regarding the financial ability and stability of the proposed assignee with respect to being able to perform all obligations of the existing Franchise or License.

D. The City shall not unreasonably withhold its consent to such an assignment or change in Control. However, in evaluating the request for assignment, transfer, sale, or change in Control, the City may, in its sole discretion and among other things, undertake a technical inspection and audit of the Telecommunications System to determine whether the Telecommunications System complies with all applicable technical and safety codes, and with this Ordinance, the Franchise, or License.

E. If the City determines (as a result of the technical inspection and audit) that the Telecommunications System does not comply with federal, state, or local standards, then the Telecommunications Carrier shall be provided with an opportunity to correct or cure the non-compliance. In the alternative and in the discretion of the City Council, the City shall work with both the current and proposed Telecommunications Carrier to cure the non-compliance.

F. Before an assignment or change in Control is approved by the City, the proposed assignee, transferee, or buyer shall execute an affidavit acknowledging that it has read, understood, and will abide by both this Ordinance and the applicable Franchise or License.

G. In the event of any approved assignment or change in Control, the assignee or transferee shall assume all obligations and liabilities of the former Telecommunications Carrier relating to the Franchise or License unless specifically relieved by the City at the time the assignment or change in Control is approved.

H. The Telecommunications Carrier shall reimburse City for City's reasonable processing and review expenses in connection with a transfer of the Franchise or License or a change in Control of the Franchise or License, including, without limitation, costs of administrative review, financial, legal, and technical evaluation of the proposed transferee, costs of consultants (including technical and legal experts), notice and publication costs, and document preparation expenses. City may send the Telecommunications Carrier an itemized description of all such charges, and the Telecommunications Carrier shall pay such amount within twenty (20) days after the receipt of such description.

I. Violation. If the Telecommunications Carrier violates any provision of this section, the Franchise or License shall terminate.

J. Telecommunications Carrier shall not lease, sell or otherwise transfer ("Transfer") any interest in any Telecommunications Facilities or Telecommunications System including conduit,

fiber, wire, cable or capacity in such conduit, fiber, wire or cable installed pursuant to this Ordinance without prior written notice to the City.

**16.10.130 System Construction Schedule/Submittal of Plans.**

A. Date For Work Completion. The Telecommunications Carrier shall complete system construction and offer Telecommunications Service and any other service authorized by the Franchise, License or Permit no later than the date specified in the Franchise, License or Permit.

B. Construction Plan. No less than one hundred twenty (120) days prior to commencement of construction, Telecommunications Carrier shall file with the City Manager or other designated employees of the City, a general construction plan describing in detail the Telecommunications System and Telecommunications Facilities, areas to be served, and an estimated time schedule for such construction ("Construction Plan"). The Construction Plan shall include photographs or artist renderings of all above-ground facilities as well as their locations, dimensions color and other information set forth in the application for the Special Telecommunications Excavation Permit as required by section 16.10.060 or as modified with City approval. Any modifications to construction plans must be reviewed and approved by the City before modifications can be implemented by Telecommunications Carrier.

C. Notice to the City. No permits shall be issued until the Construction Plan is approved by the City.

D. Notice to Other Providers. Telecommunications Carrier shall provide the City with general engineering base maps identifying existing underground and aerial utility routes, streets, parcels, poles, and construction needs including points of connections for existing residences, potential trench routes, and potential locations for Nodes, Amplifiers, Power Supplies, and taps in the Construction Plan.

E. Traffic Control Plans. Telecommunications Carrier shall furnish detailed traffic control plans, which shall include site-specific hours of construction, to the City Engineer prior to the commencement of any construction activities which may incommode traffic (the "Traffic Control Plan") at the times specified by the City. No construction related activities may be conducted in the PROW without a City approved Traffic Control Plan.

F. Telephone Contact. During construction, Telecommunications Carrier shall provide the City and residents a telephone contact number, answered twenty-four (24) hours a day, to enable the City to report any concerns regarding construction of the Facilities. After business hours such calls will be routed to an on-call supervisor. In the event that the City reports any concerns to Telecommunications Carrier, Telecommunications Carrier shall respond in a timely manner. Telecommunications Carrier shall correct within two (2) business days any adverse impact to the City's use or operations or the use or operations of a third party caused by Telecommunications Carrier construction activities in the Streets and Public Rights-of Way at no cost to the City.

G. Daily Notice. Every working day during construction, Telecommunications Carrier shall notify the designated City staff member of the location of that next day's construction activities. The number of concurrent construction locations may be limited by the City.

H. Construction Status Report. During construction, Telecommunications Carrier shall submit to the City periodic progress reports describing in detail the status of construction in relation to the Construction Plan. The first report shall be submitted within thirty (30) days of commencement of construction and shall be updated each thirty (30) days thereafter.

**16.10.140                      Location of Facilities.**

A. All Telecommunications Facilities shall be installed within existing underground ducts or conduits whenever Excess Capacity is available on reasonable terms. Overhead facilities may be installed only if space is available on existing utility poles.

B. Whenever existing Telecommunications Facilities or electric utility facilities are located underground along a particular street or public way, new Telecommunications Facilities must be installed underground along that street or public way.

C. Whenever any new or existing Telecommunications Facilities or electric utility lines are located or relocated underground along a particular street or public way, the Telecommunications Carrier shall relocate its Telecommunications Facilities underground concurrently with the other lines at its sole expense to the full extent permitted by law.

D. Whenever new Telecommunications Facilities will exhaust the capacity of a street or otherwise make the installation of future Telecommunications Facilities impractical, the Telecommunications Carrier installing the new Telecommunications Facilities shall provide additional ducts, conduits, manholes and other facilities designated by the City for reasonable nondiscriminatory access by other Telecommunications Carriers.

**16.10.150                      Coordination.**

To the maximum extent possible, Telecommunications Carrier shall coordinate its construction work with other companies installing infrastructure in the public rights-of-way. Prior to performing any work, Telecommunications Carrier shall contact all other Telecommunications Carrier and utilities using or planning to use City rights-of-way to determine (a) whether any surplus conduit is available in the areas that Telecommunications Carrier plans to install facilities, and (b) whether any joint trenching or boring projects are feasible and provide a written report relating thereto to the City.

**16.10.160                      Conditions of Use of Streets and Public Rights-of-Ways.**

A. All wires, conduits, cable, and other property and facilities of a Telecommunications Carrier shall be so located, constructed, installed and maintained so as not to endanger or unnecessarily interfere with usual and customary use, traffic and travel upon the PROW and Public Property of the City as well as adjacent private property pursuant to a routing plan to be approved by the City Manager or his/her designee.

B. In the event a Telecommunications Carrier's system creates a hazardous or unsafe condition or an unreasonable interference with property, such Telecommunications Carrier shall voluntarily, or upon the request of the City, remove or modify that part of the Telecommunications System to eliminate such condition from the subject property.

C. A Telecommunications Carrier shall not place equipment where it will interfere with existing and future City uses of the PROW or Public Property, with the rights of private property owners, with gas, electric, or telephone fixtures, with water hydrants or mains, with wastewater stations, with any traffic control system, or any other service or facility that benefits the City's or its residents' health, safety or welfare.

D. A Telecommunications Carrier, at its own expense, shall protect PROW and support or temporarily disconnect or relocate at its sole cost in the same Street or other Street or Public Right-of-Way, any property of such Telecommunications Carrier when necessitated by reason of:

1. Traffic conditions;
2. Public safety;
3. Temporary or permanent street closing;
4. Street construction or resurfacing;
5. A change or establishment of street grade;

6. Installation of sewers, drains, water pipes, storm drains, lift stations, force mains, power or signal lines, and any traffic control system; or

7. Any improvement, construction or repair or any improvement related to the City's or its residents health, safety or welfare.

E. It shall be the responsibility of a Telecommunications Carrier to locate and mark or otherwise visibly indicate and alert others to the location of its underground cable before employees, agents, of independent contractors of any entity perform work in the marked-off area. The Telecommunications Carrier shall participate in and adhere to the practices of Underground Services Alert ("USA") and provide at least forty-eight (48) hours prior notice to USA prior to any excavation.

#### **16.10.170 Duty to Remove Telecommunications Facilities from PROW and Public Property.**

A. The City may order the Telecommunications carrier to remove its facilities from public property or PROW at its own expense whenever the following occurs:

1. A Telecommunications Carrier ceases to operate all, or part of the Telecommunications System for a continuous period of six (6) months,
2. A Telecommunications Carrier ceases and fails to complete construction of the Telecommunications System outlined in the Franchise, License or Permit,
3. The City elects not to renew any Franchise, License or Permit pursuant to the provisions set forth in this Ordinance,
4. The Telecommunications Carrier's Franchise, License or Permit is revoked, the affected Telecommunications Carrier.

B. If not removed voluntarily by a Telecommunications Carrier, then the City may notify such Telecommunications Carrier that should removal of the property not be accomplished within a reasonable time specified by the City, the City may direct its officials or representatives to remove such Telecommunications System property at that **Telecommunications Carrier's**



expense. The Faithful Performance Bond, Letter of Credit, or Security Fund required as set forth in this Ordinance shall be available to pay for such work.

C. If officials or representatives of the City remove a Telecommunications System, and such Telecommunications Carrier does not claim the property within one hundred twenty (120) days of its removal, then the City may take whatever steps are available under State law to declare the property surplus, and sell it, with the proceeds of such sale (if permitted by State law) going to the City.

D. When such Telecommunications Carrier removes its Telecommunications System from the Streets, Public Rights-of-Ways and Public Property located within the City, the Telecommunications Carrier shall at its own expense, and in a manner approved by the City, replace and restore such PROW or Public Property to a condition comparable to that which existed before the work causing the disturbance was done.

E. Removal of Deactivated Equipment. Telecommunications Carriers shall maintain the deactivated Telecommunications Facilities at no cost to the City until removed by the Telecommunications Carrier. The Telecommunications Carrier shall provide a written list to the City of all deactivated Telecommunications Facilities located within the City at quarterly intervals. The Telecommunications Carrier shall remove or disable non-useful Telecommunications Facilities in accordance with a Removal Plan approved by the City. The Telecommunications Carrier shall provide the City a list of the specific Telecommunications Facilities to be removed and their locations. The Telecommunications Carrier shall remove all these Telecommunications Facilities within ninety (90) days after an underground system is activated unless another period is specified by the City

F. Upgrade of above-ground pedestals. Whenever technology has advanced to the point where a substantially smaller pedestal above ground or installation below ground would perform essentially the same function as the installed pedestals at the same approximate cost in constant dollars, and it is the then current industry practice to use such structures in new area installations, the affected Telecommunications Carrier shall at its expense promptly replace the existing pedestals with the new equipment provided however, that the replacement is not required until a reasonable period has elapsed since installation to permit the Carrier to amortize its investment in the Pedestals. The minimum period over which the Carrier is permitted by the Internal Revenue Service to depreciate the Pedestals shall be deemed to be a reasonable period. Such upgrade shall be made at the times, locations and in the manner determined by the City.

#### **16.10.180 Construction and Maintenance Standards.**

A. Methods of construction, installation, maintenance and repair of any Telecommunications System shall comply with the most current editions of the Zoning Codes, Building Codes, Excavation Codes, Construction Codes, Plumbing Codes, National Electrical Safety Code the National Electric Code, the Codes, the Public Works Construction Standards, as they are modified from time to time, and any applicable Federal or State statutes, regulations or requirements.

B. All construction, installation, maintenance and repair shall treat the aesthetics of the property as a priority, shall not substantially affect the appearance or the integrity of the structure, and shall not be installed on the bias across the property or side of a residence or other structure without the property owner's permission.

C. All underground taps shall follow (to the greatest extent possible) property lines, and cross property only at right angles unless otherwise permitted by the property owner, **or required**

due to the physical characteristics of the subsurface, or required under applicable law. The City may, either by way of a generally applicable resolution or through the imposition of routing conditions in any Franchise, License or Permit, determine the routing or placement of cable, conduit, Nodes, Pedestals, Power Supplies, vaults, and other equipment relating to the Telecommunications System.

D. All new and replacement construction shall be accomplished and maintained between the hours specified by the City in the approved permit or ordinances or as otherwise agreed to by the parties. Construction shall not interfere with the services of the City or third parties.

E. Telecommunications Carrier shall place all above-ground active and passive equipment in flush mounted or low profile waterproof pedestals whose design, size, location, color, appearance, and placement have been prior approved by the City in writing and shall be in conformance with the Code and all applicable City ordinances, regulations, rules, and guidelines. Above-ground installations shall only be allowed in situations where the Applicant has demonstrated to the reasonable satisfaction of the City that no below-ground placement is physically, technologically, or economically possible.

F. Telecommunications Carrier shall provide the City a central 24 hours a day, seven days a week, telephone contact number to receive complaints from City or its residents regarding right-of-way installations. Telecommunications Carrier shall maintain such telephone contact number so long as Telecommunications Carrier maintains any Telecommunication Facilities, Telecommunications System, or portion thereof, in, above, or under PROW.

G. Previously installed aerial cable shall be undergrounded in concert with utilities pursuant to the general ordinances of the City and applicable State law or on a voluntary basis by all utilities. This coordinated undergrounding shall be performed on a cost-sharing basis by Telecommunications Carrier and the public utilities involved.

H. Telecommunications Carrier shall be responsible for maintaining all above-ground components and landscaping or other screening in good condition, well painted and free of graffiti and other markings, undamaged and concealed from the public and property owner's view as long as the components remain. Telecommunications Carrier assumes all responsibility for damage or injury resulting from placement or maintenance of any aboveground component. If Telecommunications Carrier fails to comply with any written City demand relating thereto, the City may perform said work and withdraw its costs and expenses from the Security Fund including administrative costs established pursuant to Section 1.26(A).

I. Deviation Procedure for Nonconforming Situations.

1. In instances where Telecommunications Carrier cannot conform to any of the regulations of this Ordinance, Telecommunications Carrier may apply for a deviation.

2. A request for a deviation shall be submitted and approved prior to the submittal of any permit for installation of any Telecommunications Facilities.

3. The deviation will be reviewed and a determination made by the City Manager.

4. A deviation request shall be submitted by letter form to the City Manager and contain the following:

a. An exhibit showing the proposed location and type of Telecommunications Facilities to be installed.

b. The names and telephone numbers of any property owner, tenant or home owners association that may be affected by the deviation request.

- c. Documentation that any property owner, tenant, or home owners association that may be affected by the deviation request has been contacted and informed about the deviation request.
  - d. A detailed explanation and justification for the proposed deviation request and references to the appropriate section(s) of this Ordinance which relief is being requested.
5. A deviation shall be reviewed and a determination made based on the following findings:
- a. That the proposed request is in the best interest of the public health, safety and welfare.
  - b. That the proposed request cannot conform to the regulations of this Ordinance due to extenuating circumstances beyond the control of Telecommunications Carrier, such as but not limited to: (1) existing location of utilities from another utility provider; or (2) existing conditions which prohibit installation (e.g., walls/fences or existing structures).
  - c. That the proposed request does not cause the accumulation of Telecommunications Facilities in close proximity.

**16.10.190 Reservation of Right to Inspect Construction, Documents Related to Construction, and Tests Related to Performance, Technical Integrity and Quality of Signal, Preventive Maintenance and Safety.**

In order to verify that a Telecommunications Carrier has constructed and maintained the Telecommunications System in the manner required by this Ordinance, and conducted the various performance, technical integrity, preventive maintenance and safety tests required by federal state and local laws, the City reserves the right to inspect, at the expense of the Telecommunications Carrier, all facets of a Telecommunications Carrier's construction, as well as to inspect documents related to construction, and inspect test results related to performance, technical integrity, preventive maintenance and safety.

**16.10.200 Construction Default.**

A. Upon the failure, refusal or neglect of the Telecommunications Carrier to cause any construction, repair, or the terms of any permit, or other necessary work to comply with the terms of any Franchise Agreement or License, thereby creating an adverse impact upon public safety, City may (but shall not be required to) cause such work to be completed in whole or in part, and upon so doing shall submit to the Telecommunications Carrier an itemized statement of costs. The Telecommunications Carrier shall be given reasonable advance notice of City's intent to exercise this power, and twenty (20) days to cure the default. The Telecommunications Carrier shall, within thirty (30) days of billing, pay to City the actual costs incurred. Amounts not so timely paid may be deducted from the Performance Bonds or Security Deposit.

B. Whenever construction is being performed in a manner contrary to the provisions of this Ordinance, the City Manager, or an inspection official representing the City, may order the work stopped by notice in writing served on any person engaged in, or causing the construction. Any work stopped shall not resume until authorized in writing by the City Manager or his or her designated representative.

**16.10.210 Vacation or Abandonment.**

Except as otherwise provided by law in the event any PROW or portion thereof used by the Telecommunications Carrier shall be vacated by the City, or the use thereof discontinued by the Telecommunications Carrier, upon reasonable notice the Telecommunications Carrier shall forthwith remove its facilities therefrom unless specifically permitted to continue the same. On the removal thereof, the Telecommunications Carrier shall restore, repair or reconstruct the area where such removal has occurred, to such condition as may be required by the City, but not in excess of the original condition. In the event of any failure, neglect or refusal of the

Telecommunications Carrier, after thirty (30) days' notice by the City, to do such work, City may cause it to be done, and the Telecommunications Carrier shall, within thirty (30) days of billing, pay to City the actual costs incurred.

**16.10.220 Abandonment in Place.**

City may, upon written application by the Telecommunications Carrier, approve the abandonment of any property in place by the Telecommunications Carrier under such terms and conditions as City may approve. Upon City approved abandonment of any property in place, the Telecommunications Carrier shall cause to be executed, acknowledged, and delivered to City such instruments as City shall prescribe and approve transferring and conveying the ownership of such property to City.

**16.10.230 Facility Agreements.**

No Franchise License or Permit or other entitlement shall relieve the Telecommunications Carrier of any obligations involved in obtaining pole or conduit space from any department of City, any utility company, or from others maintaining utilities in City's PROW.

**16.10.240 System Technical Data.**

The Telecommunications Carrier shall provide City, data in a digital format specified by the City, on a computer disk or other data storage device requested by City, which details and documents all of the Telecommunications Carrier's Equipment and Facilities and their geographic location in the City. Such computer disk or other device shall be updated annually and whenever there have been significant changes in the location of the Telecommunications Carrier's Equipment and Telecommunications Facilities. In addition, the Telecommunications Carrier shall maintain in its local office a complete and up-to-date set of as-built system maps and drawings upon completion of construction or reconstruction, equipment specification and maintenance publications, and signal level diagrams for each active piece of electronic equipment in the system. As-built drawings shall show all lines and installed equipment, and tap values and spigots. The scale of maps and drawings shall be sufficient to show the required details in

easily readable form and size. Technical data at the local office shall also include approved pole applications, details and documentation of satellite and microwave equipment, mobile radio units, heavy construction vehicles and equipment, and video and audio equipment normally used in the operation of the system. If City requires use of technical data in its own offices, it may make copies of any items at Telecommunications Carrier's expense.

**16.10.250 Availability of Technical Data.**

All technical data shall be available for City's inspection during normal business hours and upon reasonable notice. In the event of System failure or other operating emergency, the technical data will be made available at any time, so long as the provision of said data does not unreasonably interfere with the Telecommunications Carrier's operations

**16.10.260 Retention and Submission of Reports and Records.**

A. Telecommunications Carrier shall maintain and retain such records and reports reasonably necessary for the City to determine compliance with the obligations imposed on it by this Ordinance.

B. Telecommunication Carrier shall provide the following information and reports annually to the City as more specifically described herein:

1. A Telecommunication Carrier shall furnish the City with the names and addresses of every Person that has entered into any agreement which authorizes, directly or indirectly, such Person to utilize a dedicated and discrete portion, by way of sale, lease, indefeasible right of use, or otherwise, Telecommunications Facilities or all or a portion of the Telecommunications System (the "Telecommunications Agreement") within the City other than a residential user, or another Telephone Corporation which possesses a Certificate of Public Convenience and Necessity from the PUC.

2. The execution of any agreement which allows any Person to utilize Telecommunications Facilities, or all or a portion of the Telecommunications System within the City, for the provision of video services, or Cable Services.

3. Telecommunications Carrier shall provide the City with copies of all Agreements specified in Paragraph (C)(1)-(2) above.

D(1). Telecommunication Carrier shall include a provision substantially similar in purpose and effect to the provision specified in subparagraph D(2) below (the "Government Approval Provision") in all future negotiated telecommunications agreements. If the City determines that a Person has failed to comply with the Governmental Approval Provision requiring prior approval from the City, the City will provide written notice to the Telecommunication Carrier and to the affected party. If the affected party fails to come into compliance or reach an agreement with the City within thirty (30) days from the date when the Telecommunication Carrier receives written notice from the City of the dispute, then the Telecommunication Carrier will notify the third party that it is in breach of its Telecommunications Agreement and that it will implement reasonable steps consistent with said Telecommunications Agreement to terminate the agreement or the portion of the agreement which provides for the provision of services which required governmental approval for which said approval was not obtained.

(2). The Government Approval Provision shall read in substance as follows:  
". . . shall obtain all government Franchises, Licenses, Permits, approvals or consents necessary for it to provide service within the City of Berkeley ("Approvals") pursuant to this Agreement. Failure to obtain such Approvals, or to maintain them as necessary during the term of this Agreement, shall constitute a material breach of this Agreement."

#### **16.10.270 Inspection and Review of Books, Records and Other Data.**

A. A Telecommunications Carrier shall keep complete and accurate books of accounts, and records of the business and operations under, and in connection with, the Telecommunications System.

B. The City shall have the right to review (either by mail or at the Telecommunications Carrier's local office) all records reasonably necessary for the administration and enforcement of this Ordinance and/or Franchise or License on fifteen (15) days written request. Such review shall occur within the Telecommunications Carrier's regular office hours unless a different time is otherwise mutually agreed upon or administratively or judicially ordered.

C. The City shall have the right to hire, at its own expense, an independent certified public accountant, or other business or financial expert, to review the books and records of a Telecommunications Carrier. If after a financial audit it is determined that the Telecommunications Carrier has underpaid amounts owed to the City by an amount **exceeding**

two percent (2%) of what was actually paid, then the City may require the Telecommunications Carrier to reimburse the City for the actual cost of the audit.

D. A false entry into the books and/or records of a Telecommunications Carrier, made by a Telecommunications Carrier, of a material fact shall constitute a material violation of this Ordinance.

E. A Telecommunications Carrier shall provide to the City upon its request complete and accurate books and records of the key aspects of the Telecommunications System's operation for at least the preceding three (3) years in such a manner that all matters pertaining to the City can be easily produced and/or verified at the request of the City. Also, the Telecommunications Carrier shall provide upon request any other applicable records and information that may be required by any other federal or state agency having jurisdiction over one or more classes of Telecommunications Carrier.

#### **16.10.280 Indemnity.**

Except as provided in or as supplemented by any Franchise Agreement, License or Permit, and to the maximum extent permitted by applicable law, a Telecommunications Carrier shall at all times defend, indemnify, protect, save harmless, and exempt the City, the City Council, its officers, agents, servants, attorneys and employees, from any, and all, penalty, damage or charges arising out of claims, suits, demands, causes of action, or award of damages whether compensatory or punitive, or expenses arising therefrom, either at law or in equity, which arise out of, or are caused by, the construction, erection, location, performance, operation, maintenance, repair, installation, replacement, removal or restoration of a Telecommunications System within the City based upon any act or omission of a Telecommunications Carrier, its agents or employees, contractors, subcontractors, independent contractors, or representatives. With respect to the penalties, damages or charges referenced herein, reasonable attorneys' fees, consultants' fees, and expert witness fees are included as those costs which shall be recovered by the City.

#### **16.10.290 Liability Insurance.**

A. Except as provided in or as supplemented by any Franchise Agreement, License or Permit, a Telecommunications Carrier shall secure and maintain, public liability, property damage insurance, and umbrella coverage in at least the following amounts:

1. Public liability: One million dollars per person/per occurrence;
2. Property damage: One million dollars per any one claim;
3. Umbrella liability: Five million dollars.

B. The public and personal liability and property damage insurance policy shall specifically include the City, the City Council, its employees, and agents as additional insureds.

C. The public and personal liability and property damage insurance policies shall be issued by an agent or representative of an insurance company licensed to do business in the State and which has one of the three highest or best ratings from the Alfred M. Best Company.

D. The public liability and property damage insurance policies shall contain an endorsement obligating the insurance company to furnish the City with at least thirty (30) days written notice in advance of the cancellation of the policy.

E. Renewal or replacement policies or certificates shall be delivered to the City at least fifteen (15) days before the expiration of the insurance which such policies are to renew or be replaced.

F. Before a Telecommunications System provides Telecommunications Service to subscribers, the Telecommunications Carrier shall deliver the policies or certificates representing the insurance to the City as required herein.

#### **16.10.300 Financial Security.**

A. Security Fund.

1. Prior to the Effective Date of the any Franchise, License, Permit or other authorization, the Telecommunications Carrier shall deposit into a bank account established by the City, which may be commingled with security deposits from other Telecommunications Carriers, and shall maintain on deposit through the term of any Franchise, License, Permit, or other authorization, a sum specified in any Franchise, License, Permit, or other authorization as security for the faithful performance by Telecommunications Carrier of all of the provisions of any Franchise, License, Permit or other authorization, and compliance with this Ordinance and with all orders, permits and directions of the City, or any designated representative of the City having jurisdiction over Telecommunications Carrier's acts or defaults under any Franchise, License, Permit or other authorization of this Ordinance, and as security for the payment to the City of any claims, fees, liens, maintenance obligations relating to above-ground facilities, or taxes due the City which arise by reason of the construction, operation or maintenance of the System pursuant to any Franchise, License, Permit or other authorization, or this Ordinance, and to satisfy any actual or liquidated damages arising out of a breach. In lieu of the Security, the City may, in its discretion, accept a Letter of Credit for an equivalent amount in a form and from a financial institution acceptable to the City.

2. Except as otherwise provided in any Franchise, License, Permit, or other authorization, if the Telecommunications Carrier fails, after twenty (20) days written notice, to pay to the City any fees that are due and unpaid, or fails to repay within such twenty (20) days, any damages, costs or expenses which the City is compelled to pay by reason of any act or default of the Telecommunications Carrier in connection with its Franchise, License, Permit, or other authorization; or if Telecommunications Carrier fails to comply with any provision of any Franchise, License, Permit, or other authorization or this Ordinance and the City determines that such failure was without just cause and, in a manner consistent with the procedures specified in this Ordinance, City reasonably determines it can be remedied by a withdrawal from the security fund or is nevertheless subject to liquidated damages, then, in any such event, the City may immediately withdraw the amount thereof from the security fund, with interest and any liquidated damages. Upon such withdrawal, the City shall notify the Telecommunications Carrier of the amount and the date of withdrawal.

3. Within thirty (30) days after notice to Telecommunications Carrier that any amount has been withdrawn by City from the security fund, the Telecommunications Carrier shall deposit a sum of money sufficient to restore such security fund to the original amount.

4. Telecommunications Carrier shall be entitled to the return of the security fund, or portion thereof, with interest, that remains on deposit at the expiration or termination of any Franchise, License, Permit, or other authorization, once all amounts due to the City have been paid.

5. The rights reserved to the City with respect to the security fund are in addition to all other rights of the City, and no action, proceeding or exercise of a right with respect to such security fund shall affect any other right the City may have.

B. Faithful Performance Bond. Prior to issuance of any Franchise, License, Permit, or other authorization, Telecommunications Carrier shall furnish proof of the posting of a faithful performance bond in favor of the City, with corporate surety approved by the City in the sum specified in any Franchise, License, Permit, or other authorization and conditioned that the Telecommunications Carrier shall well and truly observe, fulfill, and perform each term and condition of any Franchise, License, Permit, or other authorization; provided, however, that such bond shall not be required after certification by City of the completion of construction. The corporate surety must be authorized to issue such bonds in the State of California, and the bond must be obtained and secured through an authorized agent in the City of Berkeley. During the course of construction, the amount of the bond may from time to time be reduced, as provided in any Franchise, License, Permit, or other authorization. Written evidence of payment of premiums shall be filed with the City.

**16.10.320      Telecommunications Carriers Seeking Relief from This Ordinance.**



A. Any Telecommunications Carrier governed by this Ordinance may file a written petition with the City Council seeking relief from one or more provisions of this Ordinance. A Telecommunications Carrier may specifically request the exemption from, or delay in, implementation of one or more provisions of this Ordinance. Also, the Telecommunications Carrier may request that a specific provision of this Ordinance not apply to such Telecommunications Carrier for a specified length of time or duration. The burden of persuasion and proof shall be on the requesting Telecommunications Carrier. The petition shall set forth the relief requested and the basis thereof with such supporting information and material as may be applicable and as requested by the City and the payment of a fee established by the City Manager designed to recover the City's actual costs of processing said application.

B. In order to receive any relief from one or more of the provisions of this Ordinance, a Telecommunications Carrier must demonstrate and prove to the City Council's reasonable satisfaction that at least one of the following facts exist:

1. That compliance with a particular provision and/or requirement would be commercially impracticable; or

2. That the Telecommunications Carrier has its own construction, maintenance, operation or customer service policies, which the City Council deems comparable to, or which exceed, any provision and/or requirement from which the Telecommunications Carrier seeks relief, or

3. That the health, safety and welfare interests of the City otherwise warrant the granting of such relief.

#### **16.10.330 Failure of the City to Enforce this Ordinance.**

A Telecommunications Carrier shall not be excused from complying with any of the requirements of this Ordinance, or any subsequently adopted amendments to this Ordinance, by any failure of the City on any one or more occasions to seek, or insist upon, compliance with such requirements or provisions.

#### **16.10.340 Telecommunications Carriers or Its Assignees Subject to Present and Future Ordinances and/or Resolutions.**

A. Any Telecommunications Carrier, its assignees, or transferees shall be subject to, and expected to comply with, all applicable ordinances and/or resolutions now or hereafter adopted and in effect within the City, including this Ordinance, to the extent that said Telecommunications Carrier has not received an exemption or relief from said ordinance(s) and/or resolution(s).

B. Any Telecommunications Carrier, its assignee, or transferee shall be subject to all federal and State laws and with all rules and regulations issued by all applicable regulatory agencies now or hereafter in existence.

C. To the extent not inconsistent with applicable law, any Telecommunications Carrier, its assignee, or transferee shall be subject to all enactments which constitute lawful exercises of the City's police power.

#### **16.10.350 Resolution of Conflicts Between this Ordinance and a Subsequent Franchise Agreement or License.**

Except as expressly provided to the contrary in such Franchise or License, where there is a conflict between this Ordinance and a subsequently granted Franchise Agreement or License, this Ordinance shall control and prevail.

#### **16.10.360 Force Majeure.**

Notwithstanding the other provisions of this Ordinance, a Telecommunications Carrier shall not be held in violation or material breach, default, or noncompliance of this Ordinance, nor suffer any enforcement or penalty relating thereto where such violation, breach, default or

noncompliance occurred or was caused by the force of an earthquake, flood, tidal wave, hurricane, or similar act of nature, or other event that is beyond a Telecommunications Carrier's ability to reasonably anticipate and control but shall not include an economic inability to perform.

**16.10.370 Notices.**

A. Both the City and each Telecommunications Carrier shall provide the other with the name and address of the contact designated to receive notices, filings, reports, records, documents and other correspondence. All notices shall be delivered to each party's contact by certified mail, return receipt requested, personal service with a signed receipt of delivery, overnight with receipt verification, or facsimile. All other filings, reports, records, documents and other correspondence may be delivered by any legally permissible means including, but not limited to, facsimile transmission, personal service, overnight mail, or package delivery. The delivery of all notices, reports, records and other correspondence shall be deemed to have occurred at the time of receipt unless otherwise designated by State law.

B. If the Telecommunications Carrier is required to maintain a Franchise or License, then the designation of such contact person for notice purposes may be contained within a Franchise Agreement or License.

**16.10.380 Severability.**

If any word, phrase, sentence, part, section, subsection, or other portion of this Ordinance, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this Ordinance, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect.

**16.10.390 Administration--Declaration of Powers and Authority.**

A. The City Manager is designated the officer of the City that is responsible for the continuing administration of this Ordinance and matters related to Telecommunications Service.

B. Unless prohibited by federal, State or local law, the City Manager may further delegate his/her powers and authority to a duly authorized representative with respect to administering this Ordinance or an applicable Franchise or License.

**16.10.400 Revocation and Termination.**

In addition to all other rights and powers retained by the City, the City shall have the right to revoke any Permit, Franchise or License granted hereunder and to terminate all rights and privileges of the Permit, Franchise or License hereunder in the event of a substantial breach of the terms and conditions of said Permit, Franchise or License, or of any rule or regulation of the City or City Engineer. A substantial breach shall include, but shall not be limited to, the following:

(1) Violation of any material provision of this ordinance or of any Permit, Franchise or License granted or renewed or pursuant to this ordinance;

(2) Any attempt to evade any material provision of the Permit, Franchise or License or to practice any fraud or deceit or deception upon the City;

(3) The failure to obtain permits for, or to begin or complete construction as provided under this ordinance and under the Franchise or License;

(4) Material misrepresentation of fact in the application for or negotiation of the Permit, Franchise or License;

(5) Conviction of any director, officer, employee, or agent of a Telecommunications Carrier of the offense of bribery or fraud connected with or resulting from the awarding of the Franchise or License;

(6) Failure to pay any Permit Fee, License Fee, or Franchise Fee or other payment required by this Ordinance, or required by any Permit, Franchise, or License granted pursuant to this Ordinance, to the City when due. Failure to pay said fee shall also require the Telecommunications Carrier to pay interest on any past-due fee or compensation to the City at the rate of one and one-half percent per month on the unpaid amount.

**16.10.410 Possessory Interest.**

By accepting any Franchise, License, or Permit granted pursuant to this Ordinance, Telecommunication Carrier acknowledges that notice is and was hereby given to Telecommunication Carrier pursuant to California Revenue and Taxation Code Section 107.6 that use or occupancy of any Public Property may cause certain taxes to be levied upon such interest. Telecommunication Carrier shall be solely liable for, and shall pay and discharge prior to delinquency, any and all possessory interest taxes or other taxes levied against its right to possession, occupancy or use of any PROW or Public Property pursuant to any right of possession, occupancy or use created by any Permit, Franchise or License.

**16.10.420 Violations.**

A. Criminal Penalties. Any person who violates any provision of this Ordinance shall be guilty of a misdemeanor or an infraction.

B. Civil Penalties. Any person who violates any provision of this Ordinance, or who violates any material condition of any Franchise, License or Permit issued hereunder, or who breaches any franchise agreement or other agreement with the City shall be liable to the City for a civil penalty of One Thousand Dollars (\$1,000.00). For continuing violations or breaches, each day that a violation or breach continues shall be deemed a separate violation or breach subject to an additional civil penalty.

C. Termination or Modification of Agreements. If any person breaches any Franchise, License, Permit, this Ordinance or other agreement made pursuant to this Ordinance, the City may, following reasonable notice, opportunity to cure and opportunity to be heard, terminate the Franchise, License, Permit, or other agreement and, in addition, deny any future Franchise, License, or Permit.

D. Cumulative Remedies. The foregoing remedies shall be deemed non-exclusive, cumulative remedies and in addition to any other remedy the City may have at law or in equity.

Section 2. Copies of this Ordinance shall be posted for two (2) days prior to adoption in the display case located near the walkway in front of Old City Hall, 2134 Martin Luther King, Jr. Way. Within fifteen (15) days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation

\* \* \* \* \*

At a regular meeting of the Council of the City of Berkeley, held on December 19, 2000, this Bill was passed to print and ordered published by posting by the following vote:

Ayes: Councilmembers Armstrong, Breland, Hawley, Maio, Olds, Spring and Mayor Dean

Noes: Councilmember Worthington.

Absent: Councilmember Shirek.

At a special meeting of the Council of the City of Berkeley held on December 22, 2000 this Ordinance was adopted by the following vote:

Ayes: Councilmembers Maio, Olds. Shirek, Spring, Woolley and Mayor Dean.

Noes: None.

Absent: Councilmembers Armstrong, Breland and Worthington.

ATTEST: \_\_\_\_\_  
Sherry M. Kelly, City Clerk

\_\_\_\_\_  
Shirley Dean, Mayor

In effect: January 21, 2001

**EXHIBIT E**  
**Clayton, Missouri Restoration Specifications**

**Exhibit only available in hard copy filing.**

**EXHIBIT F**  
**Medina, Washington In-kind Compensation Requirements**

METROMEDIA & AT&T

In return for use of city rights-of-way and, especially, easement through park, which city is not mandated to provide under State law, the City requires the following:

1. Direct connection to City Hall.
2. Dedication of 8 fibers for use by City.
3. Agreement that City may provide services of any nature through the use of its dedicated fiber, including telecommunications and cable services to Medina residents, the residents of Clyde Hill, Hunts Point and Yarrow Point.
4. Free long distance calling.
5. Annual easement fee of \$250,000.
6. If the system is abandoned, it becomes the property of the City.
7. Fiber connection to Medina Elementary School.
8. Easement rights provided for five (5) years.
9. Easement shall not be wider than absolutely necessary.
10. Institutional network connecting City Hall, City Shop and any future City facilities.
11. Free high speed internet access to all Medina citizens.
12. Telecommunication right-of-way use authorization permit fee of \$1,000 plus consultant fees.
13. Telecommunication franchise application fee of \$1,500 plus consultant fees and cost of publication of Franchise Ordinance.
14. Facility or grounds lease application fee of \$1,000 plus consultant fees.
15. No overhead facilities.
16. Provide the best services available to any customer within the state to Medina citizens at best rate available within the state.